# United States Court of Appeals for the Second Circuit



# APPELLANT'S BRIEF & APPENDIX

10-4

To Be Argued On Appeal BY David M. Brodsky

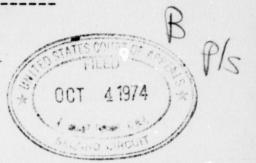
# 741-11171

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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DOCKET NO. 74-1971



UNITED STATES OF AMERICA,

Appellee,

-v.-

HAROLD NISNEWITZ,

Appellant.

On Appeal From The United States District Court For The Southern District of New York

BRIEF AND APPENDIX
OF THE APPELLANT

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#### UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74/1971

UNITED STATES OF AMERICA,

Appellee,

-v.
HAROLD NISNEWITZ,

Appellant.

#### Preliminary Statement

Harold Nisnewitz appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on July 11, 1974 after a seven day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 74 Cr. 96 filed January 30, 1974, charges
Nisnewitz, Jose Ramos, Jr., and Thomas LaMorte with conspiracy
to file false statements on loan applications to insured banks
(Count Seven) and charges Nisnewitz alone with six counts of
aiding and abetting the filing of false statements on loan
applications with insured banks (Counts One to Six), in violation of 18 U.S.C. §§371, 1014 and 2.

Upon application under the Criminal Justice Act by Nisnewitz, the Court appointed Howard Friedman to represent him.

Trial began on May 1, 1974 and concluded on May 10, 1974, when the jury found the defendant Nisnewitz guilty on all counts and acquitted the defendant LaMorte, the defendant Ramos having pleaded guilty prior to trial. Pending appeal, Nisnewitz is free on a \$10,000.00 recognizance bond.

Following the verdict, Nisnewitz requested that
his appointed counsel be relieved and that new counsel be
appointed and Judge Owen relieved Mr. Friedman of representation and appointed David M. Brodsky, Esq. for purposes of
representing Nisnewitz at the sentencing and thereafter.

At the sentencing new defense counsel moved to dismiss two counts on the grounds that there was improper venue in the Southern District of New York and moved to dismiss Count One for failure of proof. Both motions were denied by the Court.

#### Statement of Facts

#### The Government's Case

#### 1. The Loan Applicants

Four witnesses for the Government testified that loan applications were filled out by them and the defendant Harold Nisnewitz and brought by them to various banks for the purpose of obtaining loans to go into the pyramid investment schemes of Glenn Turner, known as Dare To Be Great or Koscot.

The four witnesses were Natalie V. Prenclau

(Count One - First National City Bank), Roger LaFerla

(Count Two - First National City Bank), Gustavo Ramirez

(Count Three - Manufacturers Hanover Trust; Count Four 
First National City Bank), and Johnny A. Rodriguez (Count

Five - Manufacturers Hanover Trust; Count Six - First

National City Bank).

Each witness testified, with little variation among them, that a representative of Koscot or Dare To Be Great

referred them to Harold Nisnewitz during the time that
the applicants were considering making an investment in
Koscot or Dare To Be Great. They were informed that a
fee of \$150.00 would be charged by Nisnewitz for his
accounting services in preparing a loan application and
upon a first or second visit to Nisnewitz paid him \$150.00
in cash. Loan applications for each applicant were filled
out by Nisnewitz utilizing information in part derived
from the loan applicants and in part derived from Nisnewitz as to the applicant's age, prior salary, prior employment, and purpose of the loan.

A loan application (GX-1)\* for Natalie Prenclau

Rowe was filled out by Nisnewitz for First National City

Bank and upon bringing the application to the Canal Street and

Broadway branch of First National City Bank, where co
defendant Ramos was employed as a loan officer, her loan for

\$1,000.00 was approved and she received the money from a

loan officer and thereafter gave Nisnewitz \$100.00 in cash

and a \$50.00 money order (Tr. 95-99).\* Her loan application,

<sup>\* &</sup>quot;GX" refers to Government's Exhibit; "Tr." refers to pages of the official transcript.

she testified, was false in that she stated therein that she was employed by the Salvation Army when in fact she was unemployed (Tr. 90, 93). She testified that she told Nisnewitz she could obtain verification of employment at Salvation Army from a friend (Tr. 93).

The loan application for Gustavo Ramirez at the Ozone Park branch of Manufacturers Hanover Trust was turned down (Tr. 61); however, Nisnewitz told him that for a fee of 5%, he could go to another bank (Tr. 185), and thereafter the loan application at Ramos' branch of First National City Bank, was approved after two visits by Ramirez to see Ramos (Tr. 63-65). On the second visit, Ramirez paid \$70.00 in cash to Ramos (Tr. 66). Ramirez testified that he signed the application to Manufacturers Hanover (GX-3) without reading it and that it and the application to First National City Bank (GX-4) contained false information as to salary, extra income, birth date, and loan purpose (Tr. 68-69, 173, 180-81, 199).

Manufacturers Hanover Trust (GX-5) was filled out after Rodriguez told Nisnewitz he was unemployed and on welfare (Tr. 225) and said that a friend could verify employment (Tr. 225-6). He brought the completed loan application to Westphal's branch of Manufacturers Hanover Trust but it was turned down (Tr. 230). He went back to Nisnewitz who helped him prepare another application for First National City Bank. This application (GX-6) contained false information as to employer, salary, and other income (Tr. 229). After being presented to First National City Bank, the loan application at First National City Bank was turned down (Tr. 235).

Roger LaFerla testified that a loan application for Manufacturers Hanover Trust Company was filled out by Nisnewitz and that it contained false information as to his employer and salary (Tr. 381-2). This loan application was denied. Thereafter, another application (GX-2) for

First National City Bank was prepared with similar false information (Tr. 382) and presented to the bank but LaFerla later heard it had been turned down (Tr. 395).

### 2. Testimony of Co-Defendant Jose Ramos, Jr.

In addition to the four loan applicants testifying, the Government called as its witness a co-defendant charged in the conspiracy count, Jose Ramos, Jr., who pled guilty prior to trial and whose testimony was elicited as against both LaMorte, the co-defendant who was acquitted, and Nisnewitz.

Ramos testified that he was a loan officer who processed loans at the First National City branch at Canal Street and Broadway, that was involved in Counts One, Two, Four and Six (Tr. 265). He testified that he knew Thomas LaMorte for several years (Tr. 265) and that he had first heard of Nisnewitz through LaMorte in late 1971 or early 1972 (Tr. 266). He further testified that he had never met

Nisnewitz face to face but had only talked to him over the phone with respect to persons whom Nisnewitz sent to Ramos to obtain personal loans (Tr. 267). Ramos testified about the circumstances of the Prenclau, Ramirez and Rodriguez loans (Tr. 268-309). With respect to the Ramirez loan, Ramos testified that Nisnewitz had called him to say Ramirez would be in to apply for a loan he needed (Tr. 274); and that the loan was approved (Tr. 277). When Ramirez was given the cash for the loan applied for, he paid Ramos \$70.00 in cash (Tr. 277). Ramos testified he was surprised to have Ramirez offer the money (Tr. ), and that after he left work that day he gave \$35.00 of the \$70.00 to LaMorte (Tr. 279).

On cross-examination, Ramos testified that he never discussed with Nisnewitz receiving any money from anyone for a loan application that was to be approved (Tr. 292). He testified that, without discussing the applications with Nisnewitz, he himself falsified information on loan applications from Prenclau, Ramirez, and Rodriguez (Tr. 292).

When Natalie Prenclau came to see Ramos, Ramos testified that she used LaMorte's name and did not mention Nisnewitz' name (Tr. 293). Ramos testified that he did not discuss Prenclau's loan application with Nisnewitz and did not ever receive any money from Nisnewitz for approving that application (Tr. 296).

With respect to the Ramirez application, Nisnewitz called Ramos in early February, 1972, and Ramos told him to have Ramirez come to the bank. Ramos did not ask
Nisnewitz to have Ramirez bring in five percent of the loan amount (Tr. 305-6).

Rodriguez did not discuss the payment of money to Ramos nor did Ramos discuss such payments with Nisnewitz or LaMorte (Tr. 309, 357).

Ramos testified that he never discussed with Nisnewitz what to put in the applications in order to have them go through and be approved and that neither Nisnewitz nor LaMorte ever told Ramos that there was anything false in any of the loan applications (Tr. 349-50).

#### 3. Bank Witnesses

Richard Reilly and Reuben Slutsky testified that they were employed respectively by First National City Bank and Manufacturers Hanover Trust Company and each identified loan applications offered by the Government as being loan applications to one or the other of their banks (Tr. 44-48).

Slutsky testified that in the case of applications for loans to Manufacturers Hanover Trust Company the applications are sent from the branch offices to a credit department committee located at 4 New York Plaza in Manhattan for approval or declination of the loan (Tr. 48).

#### The Defendant's Case

Harold Nisnewitz testified on his own behalf that he was never a part of Glenn Turner's enterprises and that an acquaintance in Dare To Be Great referred some people to him regarding obtaining distributorships (Tr. 530).

Nisnewitz testified in substance that he did not consciously falsify any information contained on loan applications, and that he had never told or directed loan applicants to put false information into the loan applications, but had written down what they told him (Tr. 566-67). He further testified that he had never offered or paid money to Ramos or LaMorte to approve loan applications (Tr. 581-2), that he had discouraged loan applicants from applying for loans in order to go into Koscot or Dare To Be Great (Tr. 533, 545, 598) and that the fee of \$150.00 that he received was for the purpose of advising loan applicants as to whether or not they should go into Koscot or Dare To Be Great and if they did go into Koscot or Dare To Be Great to provide future services for them in the realm of accounting and tax services (Tr. 546).

#### POINT I

THE PROSECUTOR'S SUMMATION EXCEEDED THE BOUNDS OF PROPER COMMENTARY AND NECESSITATES REVERSAL

The prosecutor's summation in this case was especially crucial because of the sharp conflicts in testimony between the loan applicants and appellant, and because the testimony of co-defendant Ramos was essentially harmless regarding appellant.

Thus, under the circumstances, the jury looked to the prosecutor for a clear version of the Government's arguments on the evidence. What they received, however, was a summation which extended from fair commentary on the evidence to (a) statements of belief by the prosecutor in the truth of the loan applicants' testimony, (b) a distortion of the evidence and commentary on evidence outside the record, and (c) assertions amounting to exhortations to the jury to believe in the Government's case because of the position of the Government as a litigant.

## (a) Statements of belief by the prosecutor in the truth of the loan applicant's testimony

In her summation, the prosecutor strongly - and impermissibly - asserted that the co-defendant Ramos was telling the truth, as follows:

"First you have the defendant Ramos. The defendant Ramos has pled guilty to this charge in the indictment. He has pled guilty to conspiracy to submit false loan applications, and he was charged as a member of that conspiracy.

"He took the stand, and testified.

"Mr. Drescher would have you believe that Mr. Ramos lied on that stand from beginning to end except when it helped his client. Then he would concede maybe he was telling the truth.

\* \* \* \*

"Now let me ask you, when we talk about common sense, Mr. Ramos pled guilty, he testified that he pled guilty before Judge Owen. Yes, he said, 'I hope that I get some consideration when it comes time to sentencing.'

"What is he going to get consideration for?
Perjured testimony before the judge who is going to sentence him? Does that make sense to you?
That this witness is going to get on the stand and lie in front of the very judge who is going to sentence him?

"Do you remember in response to a question by Mr. Drescher, when he was asked, 'Well, what promises were you told by the government?'

"Mr. Ramos said, he was told to tell the truth. And that's what he was told to do, to tell the truth.

"He may have lied in the grand jury but he wasn't lying up there because at this point he had pled guilty. The only thing that he had going for him is if he testified for the government, told the truth in front of the judge who was going to sentence him, that was his last chance.

"Doesn't that make sense? Do you think this man is going to get up there and perjure himself and do you really believe as Mr. Drescher would suggest, that the United States Attorney's office was coaching him to perjure himself in a case? Is that important to the United States Attorney's office?

"We don't suborn perjury. We prepare witnesses, yes, we talk to witnesses; it is our duty, We represent the government in court, we have to give the government the best representation possible.

"Part of that representation is talking to witnesses, find out what the facts are. If they testified in front of the grand jury, if they had given a statement to the FBI, they are given those statements to read. That's only natural."

(b) Distortion of the evidence and commentary on evidence outside the record

Later, when the prosecutor was dealing with the testimony of appellant, she again stepped over the boundary between proper argument and impermissible comment, as follows:

"Mr. Nisnewitz testifies he is going to charge these people this fee for future accounting services. These are future clients of his, right? Future clients if they go into Koscot and Dare To Be Great; he's got a client there. They want their books and records kept. They want their tax returns done. He is in business. He wants more clients. That is not his testimony, first thing he does is say, 'Oh, don't go into this business.' I mean if you believe it. Isn't that against his financial interest? Do you really think that that was what was going on here? This is an accountant. He wants business. He wants clients. He wants to make money. But he says the first thing he does is tell these peoppe, 'Don't go into it, I don't think much of the program.'

"These are people who are coming to him through that program. Does that make sense to you? I mean does that strike you as a truthful statement? And that these people, yes, they were not named as defendants, they were named as co-conspirators, they all testified that they knew what was going on. They were victims as much as anything. Here they were all in a particular circumstance where money meant a lot to them. Some were unemployed. Miss Prenclau, her marriage had broken up. And they all find their way to Mr. Nisnewitz; and they were all hurting for money. That is certainly something that they have in common. They are all hurting for money. And yet they are willing to turn over a hundred or \$150 to Mr. Nisnewitz for future accounting services if they happen to get into a program that the reason why they are there is because they don't have the money to invest in it? "I mean, think about that. Does that make sense to you? If you were going to an accountant and you wa 'ed to invest in a company and was going to st you money, which you didn't have, would you start plunking down \$150 for future accounting services?"

As appellant's counsel correctly pointed out, in objecting to these statements, there was no testimony that the loan applicants did not have money, were "hurting for money," or indeed that they were "victims". Nor was there evidence that appellant wanted "business", "clients", or to "make money", as the Government urged.

At another point in the summation, the prosecutor asserted:

"Now, there is a great deal of argument in this case about the money order. Was the money order sent, was it given? There is no dispute there was a \$50 money order because there was a \$50 money order.

\* \* \* \*

"While we are on that \$50 money order, what other testimony do we have about the money order?

"We have Mr. Ramos testifying that he received a call from Thomas LaMorte, and LaMorte told him he was going to get a money order from Natalie Prenclau.

"And you heard the testimony from these people. What are we talking about an innocent referral? These people testified that they went to Mr. Ramos specifically down at Canal Street after having gone out to Mr. Nisnewitz' office out in Queens, sent all the way to a branch of the First National City Bank down in Canal Street, to see Mr. Ramos. They were told to see Mr. Ramos. It is true Natalie Prenclau didn't testify that she was told to see Mr. Ramos. She didn't remember. That's all she can tell us, the truth. She didn't remember.

"Natalie Prenclau said she never met Mr. LaMorte. Who is lying? You may find that it was Mr. LaMorte who was lying to Mr. Ramos; that Mr.

LaMorte was lying when he said he knew Natalie

Prenclau.

"She said she never met him. That it was Mr. LaMorte lying when he said that she had a loan with his branch or with the National Bank of North America. Mr. Drescher said if there was a loan application to the National Bank of North America by Natalie Prenclau you can bet the government would walk in here with it.

"Well, we would sure try and we didn't, because there wasn't any loan to the National Bank of North

America.

"But Mr. LaMorte told Ramos that. You may find that that's a false statement made by Mr. LaMorte --(Mr. Friedman arose.)

"THE COURT: On this record there is no evidence of any such loan."

In these excerpts, the prosecutor continually referred to matters of fact which were not supported by the record:

- (1) there was a clear dispute on the record as to the \$50 money order;
- (2) Ramos' testimony was that LaMorte called him as to a \$15 money order, not a \$50 money order;
- (3) Prenclau testified that she was not told to see any particular person at First National City Bank, not that she "didn't remember";
- (4) no evidence at all was adduced as to a National Bank of North America loan.
  - (b) Assertions regarding the Government's position as a litigant

Throughout her summation, the prosecutor placed undue stress on the position of the Government and of the United States Attorney's Office as a litigant in this matter.

Thus, at the outset of her summation, she asserted:

"This is a very important case to the government. The government's responsibility to enforce criminal laws.

"You heard Mr. Drescher make accusations that the United States Attorney's office is all but suborning perjury on that stand. It is the duty of the United States Attorney's office to see that the criminal laws are enforced and that the reason that we are here is to present evidence to you, and you make that determination.

"Our job is to present the evidence..."

Later, the prosecutor asserted:

"Do you think this man is going to get up there and perjure himself and do you really believe as Mr. Drescher would suggest, that the United States Attorney's office was coaching him to perjure himself in a case? Is that important to the United States Attorney's office?

"We don't suborn perjury. We prepare witnesses, yes, we talk to witnesses; it is our duty. We represent the government in court, we have to give the government the best representation possible.

"Part of that representation is talking to witnesses, find out what the facts are."

Thus, the prosecutor placed the credibility of the Government and the United States Attorney's Office into the scales to give more weight to the credibility of the Government's witnesses.

These three types of commentary have strongly been inveighed against by courts and professional bodies.

In the American Bar Association's <u>Standards Relating to</u>

the Prosecution Function 5.8-5.9, at 126 et seq. (Approved Draft 1971), a prosecutor's permissible argument was specifically delimited:

"5.8 Argument to the jury.

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinions as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices

of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence or the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

"5.9 Facts outside the record.

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice."

Whether or not the prosecutor intentionally
made the improper comments cited above is irrelevant.

In <u>United States</u> v. <u>Grunberger</u>, 431 F.2d 1062 (2d Cir. 1970),
the Court held that an expression of strength in the
Government's case was "improper beyond dispute." The
Court explained that:

"If the jury believed that the prosecutor was an experienced one and knew about a lot of cases, they were left with no alternative but to believe the Government's witness, Berger. The remark was not merely an averment of a personal belief in Grunberger's guilt based on the evidence adduced at Grunberger's trial; it was a statement of belief that the jury was expected to understand came from the prosecutor's personal knowledge of, and from the prosecutor's prior experience with, other defendants and as such he was speaking as an expert based upon matter outside the record. That the remark was improper is beyond dispute. See Lawn v. United States, 355 U.S. 339, 359 n. 15, 78 S. Ct. 311, 2 L.Ed.2d 321 (1958); Gradsky v. United States, 373 F.2d 706, 710 (5 Cir. 1967); United States v. Sawyer, 347 F. 2d 372, 373 (4th Cir. 1965); United States v. Johnson, 331 F.2d 281, 282 (2 Cir.) cert. denied, Pheribo v. United States, 379 U.S. 905, 85 S.Ct. 196, 13 L.Ed. 2d 178 (1964); Thompson v. United States, 272 F.2d 919, 921 (5 Cir. 1959) cert. denied, 362 U.S. 940, 80 S.Ct. 805, 4 L.Ed.2d 769 (1960); Schmidt v. United States, 237 F.2d 542, 543 (8 Cir. 1956)."

Further, in <u>United States ex rel. Haynes</u> v.

McKendrick, 350 F.Supp. 990, 997 (S.D.N.Y. 1972), <u>aff'd</u>,

481, F2d 152 (2d Cir. 1973), Judge Motley held that assertions by the prosecutor on the defendants' credibility

amounted to a statement of belief by the prosecutor not condoned by <u>Grunberger</u>; see also <u>United States</u> v. <u>Perez</u>,

493 F.2d 1339 (10th Cir. 1974).

Under the circumstances, the statements by the Government herein also were impermissible statements of belief by the prosecutor upon which the jury would and did put unwarranted reliance.

The conviction, accordingly, should be reversed.

#### POINT II

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A VERDICT OF GUILTY AS TO COUNT 7, THE CONSPIRACY CHARGE, AND THE COURT SHOULD HAVE SET ASIDE THE VERDICT

when the jury returned with its verdict of guilty as to Nisnewitz on Count 7, and not guilty as to La Morte on Count 7, it was apparent that there was a fatal inconsistency between the two, requiring reexamination of the evidence of Nisnewitz's guilt.

Such an examination would have revealed that

- (1) the confessed co-conspirator Ramos in fact had only innocent telephone calls with Nisnewitz, never discussed with him falsifying loan applications or receiving payments, and in fact falsified information on the loan applicants solely by himself;
- (2) the co-defendant La Morte who did share in payments with Ramos had been acquitted, thus necessitating a conclusion either that there was no conspiracy or that La Morte was not a member of the conspiracy;

(3) on either theory of La Morte's acquittal, Nisnewitz should also have been acquitted.

The combination of La Morte's acquittal and Ramos' failure to inculpate Nisnewitz required the Court to grant the post-trial motion to set aside the verdict on Count 7.

In <u>Herman</u> v. <u>United States</u>, 289 F.2d 362, 368 (5th Cir.), <u>cert. denied</u>, 368 U.S. 897 (1961), the Court stated:

"A conspiracy cannot be committed by a single individual acting alone; he must act in concert with at least one other person."

Here, there was insufficient evidence on which the jury could conclude that Nisnewitz acted in conspiratorial concert with Ramos or La Morte.

Accordingly, the conviction of Nisnewitz on Count 7 should be set aside.

## POINT III

THE PROSECUTOR'S SUMMATION AND THE COURT'S CHARGE CONFUSED THE JURY AS TO WHAT STANDARDS TO APPLY IN JUDGING APPELLANT'S GUILT OR INNOCENCE OF THE CRIME CHARGED IN COUNT 7

Count Seven of the Indictment is drafted in traditional conspiracy terms; however, the Indictment also refers, in the statutory reference, to the aiding and abetting statute, 18 U.S.C. §2. Thus, the appellant was charged with conspiracy and aiding and abetting a conspiracy.

The charge in the Indictment caused both the prosecutor and the court to confuse the jury with the different standards to be applied in determining the guilt or innocence of the defendants in Count 7.

In her summation, the prosecutor asserted:

"Now the defendants Nisnewitz and LaMorte are charged not only with conspiracy but with aiding and abetting; and if they were aiding

and abetting, in submitting false loan applications, and if you find that the evidence shows that they were aiding and abetting, in submitting these false loan applications, then they have violated the law. It is not necessary that Mr. LaMorte walk into the bank with the false loan application and the judge will charge you on that. If he has a part in it, and aids and abets, and causes that false loan application to be submitted to the bank, that is a violation of the law."

Thus, the prosecutor attempted to draw a distinction between the charge of conspiracy and of aiding and abetting, and strongly implied that appellant could be guilty of the crime charged in Count Seven without being guilty of conspiracy (98 a).

Similarly, the Court charged the jury, in his very last instruction before the jury retired to deliberate:

"Finally, I further charge you that the aiding and abetting statute, Title 18, United States Code, Section 2, as to which I earlier instructed you in detail, is equally to be considered by you on the conspiracy count, count 7, should you find it to be applicable in any way to the facts that you are considering on that count.

"Now, ladies and gentlemen, with those supplementary instructions, if you will please retire to the jury room - and before going, we will swear the marshal, -- It is my duty at this time to thank the alternate jurors for their faithful and considerate service here and to excuse you with the thanks of the Court (186a)."

Earlier, the Court had charged with respect to aiding and abetting:

"Now I charge you that in order to convict, it is not necessary for the government to show that Mr. Nisnewitz physically made a false statement or that he applied for a loan.

"The law is that one who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.

"To determine whether a person aided and abetted the commission of an offense, you ask yourselves these questions:

"Did he associate himself with the venture?"
Did he participate in it as something

he wished to bring about?

"Did he seek by his actions to make it succeed?

"If he did, then he is an aider and abettor.

"Under the law, a person may be guilty of making a false statement if he knowingly causes another to do the act, resulting in the misstatement of act, whether the party thus actually making the misstatement of fact is a knowing participant in the falsification or simply an innocent intermediary whose misstatement is the result of ignorance, negligence, or misunderstanding rather than intention (139a-140a)."

Thus, the Court in effect charged the jury
that appellant could be guilty of the crime charged in
Count 7 if he associated himself with persons who were
"simply innocent intermediaries." Further, the Court's
charge left it open for the jury to apply the tests of
aiding and abetting to the charge of conspiracy, involving
different elements.

In <u>United States</u> v. <u>Falcone</u>, 311 U.S. 205

(1940), the Supreme Court was faced with the question of what evidence was sufficient to sustain a conviction for conspiracy. The Government sought to raise the argument, which the Court refused to consider, that one who has knowledge of a conspiracy to distill illicit spirits and sells materials to a conspirator knowing they will be used in the distilling is himself guilty of conspiracy. Either of two theories was advanced to support this argument:

(1) "either because his knowledge combined with his action makes him a participant in the agreement which is the conspiracy" or (2) "what is the same thing he is a principal

in the conspiracy as an aider or abettor..." (supra at 204).

Thereafter, in <u>Direct Sales Co.</u> v. <u>United States</u>,

319 U.S. 703, 709 (1943), the <u>Falcone</u> principle was stated as:

"one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy (Emphasis added)."

Thus, the Supreme Court recognized that one may be an aider and abettor of a conspiracy innocently, without becoming a member of the conspiracy.

In Nye & Nissen v. United States, 336 U.S. 613

(1949), the Court went further, stating that the conspiracy theory underlying the rule in Pinkerton v. United States, 328 U.S. 640(1946) was narrow in scope, "do[ing] service where the conspiracy was one to commit offenses of the character described in the substantive counts. Aiding and abetting has a broader application...Aiding and abetting rests on a broader base..." (supra at 612).

Finally, in <u>United States</u> v. <u>Tropiano</u>, 418

F.2d 1069 (2d Cir. 1969), <u>cert. denied</u>, 397 U.S. 1021 (1970), the Court of Appeals for this Circuit stated that:

"Conspiracy to commit a substantive offense and aiding and abetting the commission of the same offense constitute separate and distinct crimes..."

See also Ottomano v. United States, 468 F.2d 269 (1st Cir. 1972), cert. denied, 409 U.S. 1128, reh. denied, 410 U.S. 948 (1973).

Collectively, these cases stand for the proposition that aiding and abetting and conspiracy involve and require different standards of proof and are separate and distinct crimes.

The crucial aspect in this case is that appellant and LaMorte were charged with conspiracy and aiding and abetting a conspiracy, the latter charge of which required the jury to apply a different standard to the evidence than the former. But neither the Court nor the prosecutor helped illuminate the difficult area; rather, the jury

was left to its own devices to apply the aiding and abetting standard to the conspiracy charge.

This was error; the jury should have been clearly instructed on the possibility, highlighted in Falcone and in Direct Sales, that one could be an aider and abettor of the conspiracy, and not be guilty of conspiracy. The jury, in fact, was confused by the conspiracy and aiding and abetting charge, asking that the "elements" of conspiracy be read back to them, and asking to have copies of the Indictment sent to them, both requests being granted (217a, 219a-220a).

Because the jury was essentially left uninstructed and misinstructed on the crucial area of aiding and abetting and conspiracy, the conviction of Nisnewitz should be reversed.

## POINT IV

THE GOVERNMENT FAILED TO PROVE THE NECESSARY ELEMENT OF VENUE IN THE SOUTHERN DISTRICT OF NEW YORK

"in the Southern District of New York and elsewhere", appellant aided and abetted the filing of false bank applications at Manufacturers Hanover Trust Company by Gustavo Ramirez and Johnny A. Rodriguez. The particular bank involved was a branch of Manufacturers Hanover in Queens in the Eastern District of New York. There was no evidence that any act by any person in any way whatsoever connected with the preparation and filing of the false bank applications of Ramirez and Rodriguez at this bank was performed and committed in the Southern District of New York. In fact, every act was performed in the Eastern District of New York.

Under Rule 18, F.R.Cr.P., "except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."

Any offense that was committed was committed at the branch in the Eastern District of New York and it was the official act of that bank branch that the Government's proof, taking in its strongest light, indicated that appellant intended to influence. Furthermore, all of Nisnewitz' activities in preparing these particular bank applications also took place at Ozone Park, so that the aiding and abetting aspect of the offense also took place in the Eastern District.

"The venue rules and the jury vicanage provision of the Sixth Amendment are not to be treated lightly. United States v. Johnson, 323 U.S. 273, 276 (1944); Travis v. United States, 364 U.S. 631, 636 (1961); Delaney v. United States, 199 F.2d, 107, 115-116 (1st Cir. 1952)". United States v. Flaxman, 304 F. Lupp. 1301 (S.D.N.Y. 1969).

In <u>Flaxman</u>, Judge Tyler held that where the Government had charged that the defendant aided and abetted others in falsifying material facts within the jurisdiction of an agency of the United States, and where it had proved that "the defendant completed his active role in the crime in the Eastern District [where] the forms were handed over

in Manhattan" (at 1304), and where "virtually all the
evidence which the jury had to consider related to events
which took place in the Eastern District" (id), the indictment could not stand in the Southern District of New York
and was dismissed.

United States v. Candella, 487 F.2d 1223 (2d Cir. 1973), cert. denied, 39 L.Ed.2d 872 (1974) is not the contrary. There, Judge Mulligan held that, where affidavits and bills of lading were "simply accepted at the City's branch office in Brooklyn for the convenience of parties seeking to file papers with the Department of Relocation and were then conveyed to the central office in Manhattan for examination and payment" (supra at 1227) (emphasis added), there was an offense committed in more than one district, 18 U.S.C. §3237(a). Further, appellants cited no authority for their position that venue did not exist in the Southern District. Finally, Judge Mulligan found that "the force

Manhattan." (<u>supra</u> at 1228). Here, however, no evidence whatsoever was submitted by the Government that the defendant contemplated that the bank application be forwarded or processed to Manhattan; furthermore, there was no element of convenience of parties involved here. The applications were submitted to the branch in Queens over which Nisnewitz allegedly had influence by virtue of his relationship with one Westphal, the bank's loan officer.

Under identical circumstances, in a companion case, <u>United States</u> v. <u>Nisnewitz</u>, 74 Cr. 95 (S.D.N.Y.

July 3, 1974), Judge Lasker dismissed the indictment at the end of the trial as to Nisnewitz and a co-defendant on grounds of improper venue. The bank branch involved was the same, and the circumstances presented by the Government to prove the venue were the same. Judge Lasker held, in an oral opinion, that the crime of influencing the bank was

committed in the Eastern District, not the Southern District.\*

<sup>\*</sup> The fact that the loan applications were internally processed by Manufacturers Hanover from Queens in the Eastern District to Manhattan in the Southern District is, for purposes of venue, irrelevant. The main force of appellant and the loan applicants was spent in the Eastern District and the evidence was that it was a loan officer at the branch over which appellant had influence, and payment, if any, would have come from that branch. By comparison, in Candella, it apparently was "contemplated" by the defendants that papers filed in Brooklyn would be conveyed for official action to Manhattan where payment would be made.

### POINT V

THE FACTS AND CIRCUMSTANCES SURROUNDING THE SENTENCING OF DEFENDANT NISNEWITZ WARRANT THIS COURT'S DEPARTURE FROM ITS GENERAL RULE PRECLUDING REVIEW

Despite the general rule precluding review of criminal sentences, this court has not been loath to vacate sentences in appropriate cases. See <u>United States</u>
v. Malcolm, 432 F.2d 809, 815 n.2 (2d Cir. 1970).

Review has been granted in two broad areas. The first is in cases where the district judge has exercised no discretion whatever in setting the sentence, as in the case of mechanical sentencing, where the judge makes his determination without regard to the individual circumstances of the defendant. United States v. Schwarz, F.2d

(2d Cir. 1974) [N.Y.L.J. (8/28/74)]. See <u>United States</u>
v. <u>Baker</u>, 487 F.2d. 360 (2d Cir. 1973); <u>Woosley</u> v. <u>United</u>
States, 478 F.2d 139, 143-145 (8th Cir. 1973); and

United States v. Wilson, 450 F.2d 495, 498 (4th Cir. 1971).

Review has also been granted in cases where discretion has been exercised, but abused. As stated by this court in <u>United States</u> v. <u>Holder</u>, 412 F.2d 212, 214-15 (2d Cir. 1969)

"If the sentence could be characterized as so manifest an abuse of discretion as to violate traditional concepts, it is possible

"The rule against review of sentences is founded primarily upon the premises that a trial judge, who has the best opportunity to observe the defendant and evaluate his character, will exercise discretion in imposing sentence. \*\*\*On that assumption we ordinarily defer to the trial court's judgment. However, where as here, the district court has not exercised discretion in imposing sentence, there is no reason for us to defer to the trial court's judgment. In reviewing such a sentence, we would not be usurping the discretion vested in trial judges; rather we would be according the defendant the judicial discretion to which he is entitled.\*\*\*" [Citations ommitted]

<sup>\*</sup> As perhaps best stated in Woosley, supra at 144-145,

that we might, pursuant to our power to supervise the administration of justice in the circuit, overturn our long established precedents of non-intervention and intervene."

See also <u>Smith</u> v. <u>United States</u>, 273 F.2d 462, 469 (10th Cir. 1959) (Murrah, C.J., dissenting), <u>cert. denied</u>, 363 U.S. 846 (1960).

It is clear that the Court's sentencing herein was characterized by an abuse of discretion, and this must be modified.

Nisnewitz, who had no prior criminal record,
was married, with two children, was sentenced to a prison
term of one year and one day on Counts 1-6, and a prison
term of one year and one day on Count 7, consecutive to
Counts 1-6, but suspended as to the sentence on Count 7.

It would appear from the District Court's statement (207a-208a) that the Court placed great weight on the statement of appellant to the probation office after trial that he had

"no knowledge that the making of an incorrect bank application was a violation of law." In light of the fact that Nisnewitz faced trial on another indictment on similar charges, it is not surprising that he would make such a statement to the probation office; further, Nisnewitz's statement did not amount to a repudiation of the evidence at trial but only an attempt to indicate his failure to comprehend the seriousness of his acts.

Yet, the Court regarded such a failure of comprehension as not being worthy of credit and sentenced him accordingly.

Furthermore, in evaluating the crimes committed the Court incorrectly stated that six counts involved a "deliberate despoiling of the funds" of the banks, "almost in the nature of stealing" (206a). Yet, the evidence was that only two of the six loan applications were approved and there was no evidence at all on whether the loans were defaulted upon.

In view of the foregoing, defendant Nisnewitz contends that the sentencing involved an abuse of discretion which should cause this court to vacate the sentence.

As urged by counsel, probation would have served all of the purposes of the criminal law (200a-20la), and review of this sentence would present an excellent opportunity for the court to act in accordance with the principles of more humane sentencing as discussed at the most recent Second Circuit conference.

# CONCLUSION

For reasons set forth above, the conviction of appellant must be set aside and the matter remanded to the District Court, for a new trial.

Alternatively, the District Court should be directed to review and modify the sentence imposed.

DAVID M. BRODSKY, ESQ. Attorney for Appellant 80 Pine Street New York, N.Y. 10005 UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-1971

VALUATION OF AMERICA,

Appellee,

-v.
HAROLD NISNEWITZ,

Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

APPELLANT

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	THOMAS LA MORTE-								
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DATE		•	•		PROCEEDINGS				
-30-74	Filed indictment.								
-11-74	All defts.(attys	. pres	ent	) Plead	not guilty.	Ordered ph	otographe	d and	
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	Nisnewitz(\$10,00					)		•	
	Ramos (P.R.B. (refer to clerk's entry.)  La Norte as above.								
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-11-74	HAROLD NISMETITZ Filed notice of appearance of Martin A. Litwack - 801 2nd Ave,					Ave,			
	uvc 10017 mel#686-25hu.								

1 96	Page #2 74 CR 96
re ·	PROCEEDINGS
14 THOMAS	J. Lamorte- Filed Notice of Appearance of Henry A. Drescher - 570 Seventh Ave.  NYC 10018 Tel#2141-14125.
L THOMAS	LA MORTE Filed Notice of Motion for Varied Relief.
	AMOS - Filed deft's Financial affdvt. CJA 23.
The state of the s	LA MORTE-Filed letter dtd. 2-13-74 with memo endorsed-Time for motions is extend
	4-74Owens, J.
AMORE IN	S IA MORTE Filed pltff's affdyt in Opposition and Memorandum of Law in Oppositi
Notio	S I.A MORTE Filed MEMO ENDORSED on Deft's motion for Varied Relief filed 2-21-74.  n granted in part and denied in part as per the Sterographic Minutes of the Argum
SO .08	WERED, 3-8-74 OWEN, I. (Mailed Notice)
	RAMOS Present with atty Michele Hermann - change of Plea to Guilty (count 7)
30-74DEFT	P.S.I. Ordered. Sentence for June 13th at 4:30 p.m. Bail continued Owen J.
4 1055	RAMOS JR Filed Defts. Acknowledgment of his constitutional rights.
	t. Nisnenitz Present W/Atty. Friedman - For Trial
1-74 Des	t. Nisnenitz Present W/Atty. Friedman For Trial - Jury Selected - Trial Begun.
-2-74 Tri	al Cont'd & Adjourned until 5/6/74 at 10:00 a.m.
-6-74 Tria	1 Cont'd.
-7-74 Tria	1 Cont'd.
-8-74 Tria	1 Cont'd.
-9-74 Tris	
-10-74 Ju	ry Deliberations Cont'd. Verdict - Nisnenitz Guilty all Counts. LA Morte Not

PORAY.	Civil Docket Continuation OWEN J.	
ATE	PROCEEDINGS	Date Or Judgmen
.0-74	Trial Contid Sentence Date for Nisnwitz set for 6/14/74 at 4:30 P.M. Room 1505. P.S.I. Ordered Bail Cont'd. Owen J.	
7-74_	HAROLD NISNEWITZ-Filed deft's CJA Form #23-Financial Affidavit.	
1-74	JOSE RAMOS, JRFiled JUDGMENT and ORDER OF PRODATION (atty present)-It is adjudged that the Imposition of Sentence is hereby SUSPENDED and deft is placed on	
	UNSUPERVISED PROBATION for a period of 2 YEARSOWEN,J.	-
-74	ALL DEFTSFiled Govt's, memorandum of law.	.•
-74	HAROLD NISNEWITZ and THOMAS LA MORTE-Filed Goyt's, memorandum of law.	
-74	HAROLD NISNEWITZ-Filed JUDGMENT and COMMITMENT (atty present) It is adjudged that the deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR AND ONE DAY on each of Counts 1 through 6, said sentences to run CONCURRENTLY. In addition to the foregoing, the Deft. is sentenced to ONE (1) YEAR AND ONE (1) DAY on Count 7. Sentence on Count 7 to run CONSECUTIVELY with the sentence imposed on Counts 1 through 6. The EXECUTION of sentence on Count 7 is SUSPENDED and on that Count deft. is placed on PROBATION for a period of FIVE (5) YEARS, to commence upon expiration of sentences imposed on Counts 1 through 6, subject to the standing probation Order of this Court. Bail is continued pending appeal	
2-74	HAROLD NISNEWITZ-Filed deft's. financial affidavit.	
5-74	HAROLD NISNEWITZ-Filed deft's. memorandum of law in support of motion to vacquit.	
5-74	HAROLD NISNEWITZ-Filed Govt's, memorandum of law,	
	HAROLD NISNEWITZ-Filed notice of appeal from the final judgment entered on 7-11-74. Mailed notice to Harold Nisnewitz, 8734 Parsons Blvd., Jamaica, N.Y. 11432, U.S. Attorneys Office, Attn: Patricia M. Hynes, Esq.	
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Always leep in oilice of GUGGENHEIMER & UNTERTYT Y 80 PINE STREET, MY

UNITED STATES OF AMERICA,

HAROLD NISNEWITZ, JOSE RAMOS, JR., and THOMAS LA MORTE,

Defendants.

IMPICTMENT

The Grand Jury charges:

On or about the dates hereinafter set forth, in the Southern District of New York and elsewhere, HAROLD NISNEWITZ, the defendant, unlawfully, wilfully and knowingly did make and cause to be made and did aid, abet, counsel, command, induce and procure the making of false statements, reports and wilful overvaluations of property and security, as hereinafter set forth, in and in connection with loan applications submitted by persons, hereinafter set forth, to banks, hereinafter set forth, the deposits of which were then insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said banks to approve said loan applications.

COUNT	DATE	LOAN APPLICANT	BANK	FALSE STATEMENTS
1	1/6/72	PRENCLAU	First Nat'l City Bank	NATALIE PRENCLAU was employed by the Salvation Army.
2	2/9/72	ROGER Laferla	First Nat'l City Bank	ROGER LA FERLA was employed by Johnna Graphics at a salary of \$12,740 and earned additional income of \$3500 as a carpenter; the
		• • •		purpose of the loan was for wedding expenses.

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COUNT	DATE	LOAN APPLICANT	BANK	FALSE STATEMENTS
3	1/24/72	RAMIREZ	Manufacturers Hanover Trust	earned an annual salary of \$10,256 and earned additional income of \$3500 as a part-time salesman; the purpose of the loan was for furniture and a vacation; GUSTAVO RAMIREZ was born on March 1, 1947.
4	2/3/72	GUSTAVO RAMIREZ		earned an annual salary of \$10,256 and earned additional income of \$3500 as a part-time salesman; the purpose of the loan was for furniture and a vacation; GUSTAVO RAMIREZ was born on March 1, 1947.
5	12/20/71	JOHNNY A. RODRIGUEZ	Manufacturers Hanover Trust	JOHNNY A. RODRIGUEZ was employed and earned an annual salary of \$16,640 and earned additional income of \$4000 as a salesman; the purpose of the loan was to renew the apartment of RODRIGUEZ.
6	2/2/72	JOHNNY A. RODRIBUEZ	First Nat'l City Bank	JOHNNY A. RODRIGUEZ was employed and earned an annual salary of \$20,020 and earned additional income of \$4000 as a salesman; the purpose of the loan was to renew the apartment of RODRIGUEZ.

The Grand Jury further charges:

From on or about January 1, 1971 up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, HAROLD NISNEWITZ, an accountant, and JOSE RAMOS, Jr., who at all relevant times was a loan officer of First National City Bank and THOMAS LA MORTE, who at all relevant

times was a loan officer of National Bank of North America, the defendants, and Natalie V. Prenclau, Roger La Ferla, Gustavo Ramirez and Johnny A. Rodriguez (hereinafter "loan.applicants") named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did conspire, confederate and agree among themselves and with other persons to the Grand Jury known and unknown, to commit offenses against the United States, to wit,

Insurance Corporation.

2-1979

(a) It was part of said conspiracy that said loan applicants and others, known and unknown to the Grand Jury would seek bank loans and invest any funds obtained thereby in "Dare To Be Great", a pyramid selling program.

to violate Title 18, United States Code, Section 1014, by making

false statements, reports and wilful overvaluation of property

and security in connection with loan applications submitted by

Grand Jury, to First National City Bank, Manufacturers Hanover

Trust, National Bank of North America, and others, all banks,

the deposits of which were then insured by the Federal Deposit

said loan applicants, and others, known and unknown to the

(b) It was further part of said conspiracy that defendant NISNEWITZ would charge said loan applicants and others, known and unknown to the Grand Jury, a fee ranging from approximately \$100 to \$150 to cause loan applications containing false information to be prepared.

(c) It was further part of said conspiracy that defendant NISNEWITZ would refer said loan applicants and others, known and unknown to the Grand Jury, to defendant RAMOS at the First National City Bank and to defendant LA MORTE at the National Bank of North America for assistance in causing said loans applications to be processed by said banks and that defendants RAMOS and LA MORTE would receive fees from NISNEWITZ and others.

0-6 OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

- 1. On or about January 6, 1972 a loan application was submitted by Natalie V. Prenclau to First National City Bank.
- 2. On or about February 3, 1972 a loan application was submitted by Gustavo Ramirez to First National City Bank.

  (Title 18, United States Code, Sections 371 and 2)

FOREMAN

PAUL J. CURRAN United States Attorney .....

AFTERNOON SESSION

1:20 p.m.

(In open court; jury present.)

at a point in this trial where counsel will sum up to you.

This is their final opportunity to address you and deserves from you, and I am sure it will receive, the same careful attention and consideration I know you have given the proof in this case as you have heard it coming in.

I repeat that in considering the summations you are to keep an open mind as I urged you at the beginning of the trial throughout the summation of each counsel.

This is to keep such a state of mind until you retire to deliberate.

Now, Mr. Friedman, I understand that you will be the first to address the jury.

MR. FRIEDMAN: Yes, your Honor.

If it pleases the Court, Miss Hynes, Mr. Lawyer, Mr. Drescher, Miss Ash, ladies and gentlemen of the jury:

As Judge Owen has just advised you, we have reached that stage in the trial known as the summation.

First I would like to thank you for your attention during this trial. I noticed that you were all paying

close attention to the evidence that came from the witness chair, and I think you have a good appreciation of what has been going on here this past week.

It is at this time in the trial that I am permitted to state to you what the evidence is as far as I have heard it; I am allowed to comment on the evidence, theorize as to what the evidence was, and to direct my remarks to you regarding both the oral evidence and that evidence that has been introduced, the documents.

What I tell you the evidence is does not control.

It is what your recollection, you as the sole triers of
the fact, remember the evidence to be that controls.

So I would ask you this: That in my remarks to you, if I misquote any of the evidence, or it contradicts what you remember the evidence to be, please discount what I say, because as I said before, you are the triers of the fact, and it is what you remember the evidence to be that counts.

If I in anyway state to you something that was said from the witness chair that is incorrect, or doesn't jibe with what you remember the evidence to be, I am not doing it intentionally, I am a human being. I made notes, I have a memory, and that is all that I am relying upon.

There has been a lot of talk about Turner

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SOUARE, NEW YORK, N.Y. CO 7-4580

Enterprises, and two of its, I presume, subdivisions, Dare
To Be Great and Koscot.

They are not on trial here, I think that you have heard remarks regarding a certain pyramid scheme or a fraudulent pyramid scheme. Whether it is fraudulent or not I don't know. I have no knowledge of it; and I remember when you were selected, I believe each one of you has told the Court that you had no knowledge of Dare To Be Great, Koscot, or Turner Enterprises:

As each witness came on to the witness stand,
Mr. Pamirez, Miss Prenclau, Mr. Rodriquez, and Mr.

LaFerla, I questioned them about the meetings they went to
for either Dare To Be Great or Koscot.

I believe Mr. Ramirez and Mr. LaFerla both testified that they had gone to a number of meetings, and that on one occasion, they went upstate for two or three days with one of the organizations; either Foscot or Dare To Be Great.

Miss Prenclau, I believe, testified that she went to one meeting in Brooklyn, and Mr. Rodriguez testified that he had gone to several meetings over several months.

I tried to glean from these witnesses what they

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heard at the meetings. Not one of them testified that Mr. Nisnewitz was there.

I believe we have established that Mr. Nisnewitz was not part of Turner Enterprises, Date To Be Great, or Koscot.

What did these people learn at these meetings?

Well, first, they learned that it would be a good deal to get into either Koscot or Date To Be Great.

Mr. Ramirez testified you could make 50,000 to a hundred thousand a year if you had a distributorship. They were desirous of getting in.

I believe, I think it is a fair statement, that the people who ran Turner Enterprises purposesly got these people interested to make big money by getting into these organizations.

Secondly, I think what we were able to bring out was that a great deal of time and effort was spent on telling these people how they could get money to get into either Koscot or Date To Be Great. Mr. Ramirez told you that on his way back from the tour that they took him to upstate, a lawyer from Dare To Be Great gave him advice on how he should fill out an application to a bank. Remember that?

He told you that this lawyer said "Don't put down

on the application that you want to invest this money in Dare To Be Great. " He said put down you want a vacation or furniture or whatever he said. I am sure that it must have been explained to these people that if they were going to make bank applications they must have references. So they knew what they needed in order to get a bank loan. Let's not forget that because I think that's important, especially as it applies to Mr. Nisnewitz.

The first witness that testified for the government was a Mr. Gustavo Ramirez.

Mr. Ramirez had testified that he went to a savings bank on his own, Kings Lafayette. He testfied that he filled out an application there, that his loan was granted but he would have to have a co-signer. The Kings-Lafayette application is not before you. You don't know what was in it nor do I.

Mr. Ramirez is told by somebody that he should see Mr. Nisnewitz, and he goes to see Mr. Nisnewitz, and according to his testimony, the purpose of his visit was only to get a bank loan.

He claims that he gave Mr. Nisnewitz certain information that was true. Mr. Nisnewitz wrote it down on a pad. Then from the pad it was given to somebody to type, and it was given back to him in a sealed envelope.

He does work for Cadillac Motors. He had the correct address. He had in the application that he earned I believe the figure was 10 or \$12,000 a year from this position, and also that he had a part-time job where he earned additional money.

Ramirez -- incidentally this application, the first application filed by Ramirez went to Manufacturers Hanover. He testified Mr. Nisnewitz had sent him to see Mr. Westphal.

There is absolutely no evidence or testimony of any wrong-doing on Mr. Westphal's part or any wrong-doing between Mr. Westphal and Mr. Nisnewitz.

Mr. Nisnewitz, I believe, testified that he knew Westphal through clients who banked there, and that's why he sent Ramirez there.

Ramirez gets this application to the Manufacturers Hanover Trust Company in a sealed envelope. He didn't know what was on the application. He takes the application to Mr. Westphal. Mr. Westphal opens the application, takes four or five other papers out of his desk, Ramirez signs the application.

There is information added to the application but Ramirez still has no idea what's on the application.

Now Mr. Ramiroz testified thereafter that he was

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what the evidence is. One is that either the application was declined or, two, that he would need a co-signer.

Now, we have Mr. Ramirez' application. It is an exhibit. The jury has a right to see it, read it, study it, and I also have looked at it. It's Government's Exhibit 3 in evidence.

Now I looked through here and I noted that the application is dated 1-24-72, and next to Mr. Ramirez' signature is the date 1-25-72 and I presume that's the date he went to Manufacturers Hanover.

I also see this loan was approved. It says "Sent check to Branch 37 for pick up."

Now, on the second page of this application, it is written that the purpose of the loan is for furniture and vacation. I believe Mr. Ramirez has testified that he wrote that in his own hand.

Why is the date 1-25-72 important? I will get to that in a moment. There is a page here that is part of the record that says stamp dated January 28, 1972, "Notice sent to applicant to contact branch office."

That's January 28, 1972.

Now January 24, 1972 is a Monday, the 25th is a Tuesday, the 28th is a Friday. Assuming that Mr. Ramirez

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gets notice immediately that his loan application is either approved or declined or he needs a co-signer or whatever, the next timehe would have to contact the Manufacturers Hanover Bank has to be Monday, which is the 31st of the month, 31st of January, 1972.

He testified that after being notified from
the bank he calls Mr. Nisnewitz, and has a conversation with
him, wherein Mr. Nisnewitz said "I will call Westphal, call
me back," or words to that effect. There is a conversation
where the witness testifies thereafter that he calls Mr.
Nisnewitz back and he is told to call Westphal and
Westphal says "Call me in two days".

Well, he calls him in two days. That's February 2nd. Then he testified that he went to see Nisnewitz a day or two later. But did he? The application to the First National City Bank, Government's Exhibit 4 in evidence, and of course you are free to look at that as well, is typed with a date on top, February 3, 1972.

Now there is very little time between when he was notified by Manufacturers Hanover Trust and the date of this second application.

But we are told that thissecond application is really the third application? Well, anyway,
Mr. Ramirez does not see the application; again it is put

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into a sealed envelope, he goes down and sees Mr. Ramos, we Mr. Ramos has a conversation with him, and just generally, "You can have the loan, you will need a co-signer. At which time Mr. Ramirez took the application and ripped it up.

Then he goes back to Nisnewitz' office and another application is prepared and again he doesn't see it.

At the same time a W-2 statement is prepared for him by a Nisnewitz. He goes back and sees Ramos. But when does he see Ramos? He doesn't see him the next day. Ramos testified, and it is indicated right on the application, that it was February 9th.

Nisnewitz testified that the date he put on the application was the date that he typed them. It is reasonable. It is on every other application, but now we have a six-day hiatus and we are led to believe that during this six days, that Mr. Ramirez doesn't know that what's in the application -- or perhaps this is really the only application that was made to the First National City Bank, as Mr. Nisnewitz testified to.

Again, if you look at the application, and you may, you will see that the purpose of the loan is written in Ramirez' hand.

Ramirez stated to you that certain items in that application were false. He didn't carn the money that

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was put in there from his job at Cadillac Motors, he didn't earn additional income. The purpose of the loan is incorrect although he wrote it himself, and his date of birth is wrong.

But when he sees Ramos, there is evidence on the application that Ramos saw certain evidence; Social Security card, a Shell Credit Card, classification card, birth certificate, date of birth, 3-1-47. Mr. Ramos testified he never saw the birth certificate, but the W-2 statement he did see. We all know that a draft card has been used since the Second World War to prove somehody's age. There is a date of birth on it. So assume he did not see the birth certificate as he testified to, but he did see the draft card. Certainly that would be evidence of Mr. Ramirez' birth. Or if that had been presented to you, birth certificate, or a draft card, you would know what Ramirez' date of birth was. You would also know, if Ramirez had brought in his income tax or any other thing from that period of time, what his earnings were. But you don't know. You have to take Ramirez' word.

The next witness that the government produced was a Miss Prenclau.

Now, she was a nice lady. I think everybody

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would feel compassion for her in her situation. Miss

Prenclau was separated from her husband. She told us she was
unemployed. Apparently part of her furniture had been
in storage. She needed money. She went with a man by the
name of Tito, I believe, to a meeting of Koscot.

business, they told her how she could borrow money,
and Tito apparently had a distributorship or something
to do with Koscot, and he brought Miss Prenclau to see
Nisnewitz. Now when Miss Prenclau gave her statement
to the FBI, and that's marked in evidence and you may -orportions of it are marked in evidence and those portions
you are free to see -- and I believe they were read to
you -- Miss Prenclau testified or it was stated in the
FBI record, "When I went the second time, the application
was in an envelope. He told me to go to the" -- no,I am
sorry -- I don't want to go into that right now.

What she testified to you and what was read to you were questions from her FBI statement, No. 1, where she did not know Tito's last name. It said last name unknown. It was printed in on top, Kantish or Kandish. When she went before the grand jury she was asked questions regarding the person who brought her to Nisnewitz' office. She did not know his last name.

But when she got on the stand she was well aware that his last name was Kantish. Where did that come from? Certainly it had to be supplied by the government. Now Miss Prenclau testified that when she went to Nisnewitz' office, during the first conversation with him she told him she had no place to work or she wasn't working, and he told her to go out and get a place of employment, somebody that would verify her employment.

She came back the second time, told him that she had a Mr. Crispel or something who worked for the Salvation Army, and he would verify the employment, and allegedly Mr. Nisnewitz then wrote Salvation Army as a place of employment, and the other information contained in the application.

Now, Miss Prenclau is given this -- excuse me for calling her Prenclau, Mrs. Rowe, but we know her as Prenclau -- takes this application in an envelope from Mr. Nisnewitz, no name on the envelope, dow to the First National City Bank. Not told who to see. She testified when she got to the bank there were five or six people at desks, a woman comae in, says your turn is next, she went to a loan officer and the loan officer, she didn't know his name, she had nobody to see, took her application, she left.

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Subsequently she is advised that her loan has been granted. She wasn't told to see Ramos.

Now, was is curious about this part of it is that when Miss Prenclau went back to pick up her money, there was a conversation about a cold that she had; and she testified she did not go back because she did have a cold. Do you recall that?

Now she got her money on January 31st. That date is established. That is the day she got her money. That is the day she got the envelope with the hundred dollars; both the money order, etc.

Nisnewitz met her at her apartment house. These dates are important and I will tie them in in a moment.

When she testified or when she gave her statement to the FBI, and that's in evidence and you may look at it, that portion of it, she told the FBI that the first time when she brought the application to the bank is when the man said to her "How is your cold?" It wasn't when she got the money. This statement is April 20, 1972. This is within two months I guess or two and a half months after she got the loan that she said when she got to the bank for the first time with the application the man asked her how her cold was.

Now she comes before you and she testified that the

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reason she did not go and get her money is because she had a cold. But she went on January 31st. Dates become important.

Now we have Mr. Rodriguez. Same story. He is brought to Nisnewitz' office. From Nisnewitz' office he goes to Manulacturers Hanover Trust, sees Mr. Westphal. Gives him an application. Of course he is on welfare. All the information in the application regarding his employment, the purpose of the loan, etc., is false. But of course what was written in regarding the purpose of the loan was in Rodriguez' own hand.

Now he was brought there by a Willie Colon . Willie Colon had a distributorship in Dare To Be Great. I believe Mr. Rodriguez testified that if he could get the money from the bank -- I am sorry, it might have been Koscot -- that if he could get the money from the bank, \$5,000, he was going to buy his own distributorship.

Who was going to again buy that? Mr. Colon. testified that Mr. Colon would earn \$3,000 if he got his distributorship. They went out in the same car together. He went through the same briefing as everybody else that went to one of these meetings. He got interested in it. He decided to borrow the money, go and do it. That's what he did.

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He went to Nisnewitz' office with Colon, he
put down he worked for Colon Body Shop. Never saw
Nisnewitz before. Paid Nisnewitz a hundred dollars.
Nisnewitz said that he advised him about Koscot, told him
not to go into it, as he did with Ramirez, and as he
did with Miss Prenclau.

Now the application from Manufacturers Hanover is dated December 20th or 21st. That application was declined. That application also is in evidence and you have a perfect right to look at it.

After he learns that his application is declined, he telephones Nisnewitz, and he makes an appointment to see Nisnewitz in a couple of weeks.

Now this application was declined January 4th.

And he goes to see Nisnewitz, another application is prepared for him at the first National City Bank.

Again the information is similar to the information regarding his employment, etc., that was in the first application to Manufacturers Hanover. Nisnewitz, he says; told him to go and see Mr. Ramos. But he found out that Mr. Ramos was on jury duty. So he did not see Ramos until February the 2nd.

Now I submit to you that January 31st is a Monday, February 2nd therefore is a Wednesday.

I further submit to you that the reason Miss

Prenclau changes her testimony as to why she did not pick

up the money was not because she had a cold. It was

because Mr. Ramos was on jury duty.

Now the last witness the government brought in was Mr. La Ferla. Same routine, he went to Nisnewitz' office, and told Nisnewitz "I don't have a job".

Nisnewitz says "Don't worry about it.

I will give you one of my clients, Joanna Graphics, and we will submit the application."

Now, this application -- La Ferla testifies

that there are two applications. Of course one application
was never broughtto the Court. All you have is

Mr. La Ferla's word. That application went to Manufacturers

Hanover. And it was submitted to you in a conversation

between La Ferla, Mr. and Mrs. Walther, that Nisnewitz

used his telephone number on the application. But where
is the application? The only application that was

presented to you was one at the First National City Bank.

That one is dated February 9th. It was submitted on

February 10th. That one obviously did not have

Mr. Nisnewitz' telephone number. He told you wnat his

telephone number was.

But now when Mr. La Ferla goes to the First

National City Bank, Mr. Ramos is on jury duty.

Well, we know he wasn't on jury duty on

February 9th; because that's the day he saw Ramirez. He

wasn't on jury duty on January 31st, because that's the

day that he gave Miss Prenclau her money.

How can we glean from this when he was on jury duty? Was is the truth?

Obviously, Rodriguez must have been the closest one to the truth. He went to Manufacturers Hanover on December 20, 21, his loan was declined on January 4th, within two weeks he called Nisnewitz and when he went to the First National City Bank, Ramos was on jury duty at that time.

What is the importance of this? Well, obviously it is important; because if La Ferla had seen Ramos, then how can they get a conversation over the telephone between Mrs. Walther and Mrs. Nisnewitz saying "Go call La Morte". La Morte's name can't come up if Ramos is there.

So the dates become important. They become important for this very reason; that the government's story here just doesn't jibe. It's wrong. It has to be wrong; because these witnesses who testified immediately after the event, April, May, of 1972, testified so contradictory to their testimony here that the information had to be

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supplied to them. How could Miss Prenclau, when she first went to the National City Bank, testify that the loan officer asked her if she had a cold or how is her cold, and then when she testified before you this week or the beginning or end of last week, she testified that the reason she didn't go and get her money was because she had the cold.

Now January 6th to January 31st is 25 days.

Ramos was the one wh could have approved this loan. He testified I believe, anything under 2,000 bucks he can approve by himself.

And what becomes more curious about a lot of this evidence is that things that these witnesses said had happened differently at the beginning change.

Miss Prenclau testified that after she got the money, she took \$300 in cash and a \$700 check. A hundred she put aside to give to Nisnewitz, and \$50 to buy a money order.

Where did she buy the money order? She was in the First National City Bank. She didn't buy it there. She was in lower Manhattan. She either went to a drug store or a check cashing place.

Well, of course, again, another missing piece of evidence, the money order. She gets home, Nisnewitz is

waiting for her in the hallway. He tells her to put a name, a French sounding name, on the money order; and give it to him.

Well, she claims she did this. When she gave her statement to the FBI, she could't remember the name, only that it was French sounding; but she testified before the grand jury the name was something and then of course there was a beautiful leading question "Could it have been Thomas La Morte? Yes, it was Thomas La Morte" and she remembered that it was La Morte's name that was put on the check.

She testified before you that she gave the check to Nisnewitz. She testified or gave a statement to the FBI that she had mailed the check to La Morte.

Now Miss Prenclau, interestingly enough, corroborates Mr. Nisnewtiz' in one important event. She testifies that when she went to his office, it was to borrow money to go into Koscot. She had no conversation with Mr. Nisnewitz about how good the investment was, etc.

The only thing they talked about was how she was going to get somebody to go in and sign or give her a reference for employment.

She comes back to Nisnewitz, and at that time she says, told you, the question I asked her, "When you went

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back to Nisnewitz the second time, did you intend to go into Koscot or did you intend to buy furniture, get your furniture out of storage, or buy furnishings, etc." and she said "When I went back to him the second time I never intended to go into Koscot. I was going to do with the money what I put on the application, and that's buy furniture get my furnishings out of storage, etc."

Now, Mr. Nisnewitz testified that he spoke to her about Koscot. He told her it wasn't a good investment. The woman needed money, separated from her husband; and she saw an opportunity to get a loan. She took that opportunity.

She got the loan. But if you look at the exhibit, Miss Prenclau's application to the First National Bank, you will see that the purpose of the loan is typed. This becomes important, because on no other application is the purpose of the loan typed.

That seems to me to be indicative of what

Mr. Nisnewitz -- what his function was with these people
in typing these applications. He put down what they had
told him or what he knew to be the truth. On no other
application, although these people were sent to him from
Dare To Be Great or Koscot, did he type in that the
purpose of the loan was for furniture, vacations, wedding

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expenses, etc.

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He has denied that he ever supplied place of employment for anybody. He has denied that he ever told anybody to go out and get themselves a place of employment. He denies that he has ever fabricated anybody's earning. He denied that he ever told them to put in any of these applications additional earnings.

And as you will see from each of these applications, where in there is handwriting, it is not Mr. Nisnewitz's handwriting.

Mr. La Ferla came in and said that it was

Nisnewitz that said, "Don't worry, I am going to put down

Joanna Graphics." Nisnewitz denied that. He admitted to

you that Joanna Graphics was his client, he had done

accounting work for them; that when he put down on the

application banna Graphics, the place of business, etc., the

earnings, he had a conversation with La Ferla about it.

Mr. La Ferla said "Don't worry, I am the one that's going

to sign the application."

Now, Nisnewitz knew the nature of Joanna Graphics's business. He testified what it was. Joanna Graphics wasn't photography; they were in the printing graphic arts business. Nisnewitz knew who the supervisor or the owner of Joanna Graphics was. It was Mr. Basmagy.

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It was through Basmagy that he met Mr. La Morte.

Yes, you will note that in no way did Mr. Nisnewitz help Mr. La Ferla on this application. Didn't
supply him with the correct nature of the business. Did
not supply him with Basmagy's name. That's left blank.

These documents are here for you to see.

Look at them. You can study them. You can see what is in them.

Nisnewitz testified that he never met Ramos,

Ramos corroborated this. They never met. Nisnewitz

testified he met La Morte through Basmagy, who was the

owner of Joanna Graphics, that he supplied a financial

statement to Mr. La Morte, a loan for Basmagy and that loan

was declined. That's how he met Mr. La Morte.

Ramos testified that he never had a conversation with Nisnewitz regarding any illegal conspiracy to obtain loans. Never got any money from Nisnewitz nor did Nisnewitz ever give him any money.

He testified that any conversations he had were with Mr. La Morte. Mr. Nisnewitz, on the other hand, testified that he never had any conversation with Mr. La Morte regarding any illegal conspiracy to obtain fraudulent loans. There is absolutely not one shred of evidence that any money ever came to Nisnewitz other than

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the money that he told you that he received for his conferences with these people and for his accounting services that he was going to perform, set up their books, do their tax returns, accommodated them in filling out the applications, but information that he got only came from them.

Now, I submit to you that if you study these applications, if you recall the testimony of the witnesses, if you see how all of this was linked together purposefully, you will see that much of what you heard here is fabricated. It could not have happened the way the government presented it.

The conflict of Ramos's jury duty, that's important. He could not be on jury duty on February 9th or February 10th if he saw Mr. Ramirez on February 9th.

Mr. Nisnewitz testified, told you his story; you had an opportunity to observe him. He told you about himself. You know he is an accountant, his profession. He told you that he did not commit any of the acts the government has charged him with. You have had an opportunity to listen to the government's witnesses and observe them. You have heard them testify. You know as well as I do that either one of them or all of them could have been defendants in this case, but they weren't.

In order not to become defendants they had to come in here and tell you a story the government asked them to tell you.

MS. HYNES: I object, your Honor.

THE COURT: I am going to allow comment on the credibility of these people as witnesses.

MS. HYNES: That statement was hardly comment. That was stated as a fact.

THE COURT: Well, the jury's recollection of the testimony of the witnesses will govern. Go ahead, Mr. Friedman.

MR. FRIEDMAN: Thank you, your Honor.

One thing, this Mr. La Ferla, he got on the stand and he testified that he wasn't a carpenter. Yet the two witnesses that he brought in both stated that he had knowledge of carpentry. He said he had no knowledge of carpentry. If he is telling the truth why would he lie in that respect? There is no reason to lie, but he did.

I submit to you that when you deliberate the facts of this case, when you look at the government's exhibits, when you look at the dates of the applications, remember the testimony of Rodriguez as to going to the First National City Bank and when Ramos was on jury duty,

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and when he finally went to him and when the other people went 3 to him I submit it cannot be credible.

And I submit that after you review all of this evidence, you are going to find Mr. Nisnewitz not guilty of any of the charges in the indictment.

I thank you.

THE COURT: Mr. Drescher.

MR. DRESCHER: If your Honor pleases, my friends at the government's table, Mr. Friedman, Madam Foreman, ladies and gentlemen of this jury:

I may start off this way, in full sincerity, that this is the darndest case I have ever seen as far as it is a travestry as far as confusion, discrepancies, and contradictions, of all the witnesses. Apparently the only one who told the truth in thiscase was Mr. Ramos; when he took the stand and swore that he had lied previously. That I assume was the truth. Otherwise, you are going to have great trouble in deciding what the facts were in this case and I am going to discuss them with you at lengthlater on.

We try avisually hard to give a defendant charged with a crime every possible consideration and break. Just as if you and I were there and we expect that we get great judges, fine judges, capable judges. We have

a scries of law, principles of law, that are very, very fair to defendants.

In other words, the law says all of us, if we are defendants, there is a presumption of innocence. That is awfully powerful. That means that we are covered with a presumption, a shield, until even in the jury room we still have that; and it never dissipated until you folks as a jury say "Now, wait a minute. His guilt is proven beyond a reasonable doubt, by believable, credible, honest evidence, and we find him guilty."

At that point, that presumption is gone.

We have a lot of other principles of law that his Honor will charge you on. I might just mention one or two, that the burden is on the government, and I mention these because of the fact that I am going to fit my reference to the facts into the principles of law.

A few of you folks were jurors in civil cases,

I believe. The principle of law in a criminal case is
entirely different. In a civil case you remember the
judge told you the preponderance of evidence. That means
if the scale is a little bit in favor of one side or the
other that is how you can decide. A little.

In a criminal case those scales have got to be weighed down beyond a reasonable doubt.

When we speak of reasonable doubt, there is nothing mysterious about that, nothing. His Honor will tell you what the law is but it is common sense. If you reach a pointandal say "Now wait a minute, here is a question in this particular field, in this spot, that strikes me, I can't see where it is so, there is no reasonable basis for it," that means you haven't been convinced beyond a reasonable doubt; and if such a doubt, this judge will tell you that it is your duty to acquit the defendants.

MS. HYNES: Your Honor, can we leave the instructions on reasonable doubt to the Court.

THE COURT: Yes, Mr. Drescher.

MR. DRESCHER: I just told the jury that, Miss Hynes, that it was up to the judge, I think.

THE COURT: To the extent that --

MR. DRESCHER: There is one thing that is not fair -- may I continue?

THE COURT: I was going to say to the extent that you can leave the charge on the law to the Court, I think it more appropriate.

MR. DRESCHER: Thank you.

There is one thing that is unfair to a defendant, any of us; and it has to be done one way or the other.

Somebody has to have the last word and somebody has to have the first word. In our principle of law, we give the government the chance to have the last word, and as you see, the young lady sitting there, the prosecutor with pencil, notes, and my friend has got his pencil, so that what we say to you they can answer or try to answer.

After we are finished here, we have nothing more to say. No matter what the government says we can't interrupt and we can't attempt to answer, even if the answer is very, very obvious.

So I ask you to please, consider the evidence that my friend has just discussed with you and that I will discuss with you, and do not in any way be influenced by the fact that the government has he last word.

Listen, see if there is logic, see if there is common sense and then decide this case according to your conscience.

Now let's see what we are charged with, and
the only way to see that is the indictment. This indictment contains the first six counts I have nothing to
do with. They charge a Mr. Co-Defendant,
Nisnewitz, with certain crimes. I am not going to be
technical. They are called substantive crimes and those
crimes are that he; he himself, violated Section 1014 of

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the law. It is a very simple and very clear-cut issue. Section 1014 says this: That anyone who knowingly -- and if you forget everything else in this case but that, please remember that -- whoever knowingly makes any false statement or report, and then it goes on to say to any other organization, federal organization, but then it ends up to say to a bank, and if that bank is insured with the Federal Deposit Insurance Corporation, this applies.

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Well, apparently here there were applications for loans submitted to banks, and that comes into law; and you will see that the whole point of this case is knowledge.

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Did anybody do things knowingly attempting to deliberately file false applications with any bank?

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Now in order to bring Count 7 in, they prepare what's called a conspiracy count. And that count, as his Honor will tellyou what it is, that count says this, that three men sat down, Mr. La Morte, Nisnewitz, and Mr.

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Ramos, and they entered into a contract, they entered into an agreement, entered into a confederation.

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MS. HYNES: Your Honor, that is a blatant misstatement of this indictment, and I'd appreciate it if it wouldn't be continued in that vein.

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THE COURT: Yes, I dn't think the indictment charges that anybody sat down.

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MR. DRESCHER: I didn't mean that. I used that colloquially, sir, I didn't mean they sat at a table, your Honor.

MS. HYNES: Your Honor, these colloquial expressions of Mr. Drescher can be very important when he is making them to a jury and prefacing them by "The indictment charges that they sat down."

THE COURT: I think the error has been cor-

Mr. Drescher, will you go forward, please?

MR. DRESCHER: I accept any criticism for that remark, sir, because they couldn't have sat down.

The evidence in this case is that this man Nisnewitz he never saw Ramos so he couldn't have sat down with him.

And the only time he saw La Morte was once when he was in the bank; so he couldn't have sat down with him; and I am sure you ladies and gentlemen understood what I meant. They got together. They got together and said "Look, let's violate Section 1014. Let's consolidate together, the three of us, and let's file phony applications with banks."

That was conspiracy. That is what conspiracy means, getting together, joining parties, joining hands.

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The indictment in this case charges as part of that conspiracy, let me read it to you, there are only three subdivisions "Itwas part of said conspiracy that said loan applicants and others known and unknown to the grand jury, would seek bankloans and invest any funds obtained thereby in Dare To Be Great, a pyramid selling program."

Now right here, Ramos told you that he had nothing to do, he had no idea, no knowledge of any pyramid scheme. Nobody else has said that Mr. La Morte had any knowledge of any pyramid scheme, so that, as far as I am concerned, is out.

Then it says that Mf. Nisnewitz collected certain money and now, "It was further part of said conspiracy that defendant Nisnewitz would refer said loan applicants and others known and unknown to the grand jury to defendant Ramos at the First National City Bank and to the defendant La Morte at the National Bank of North America for assistance in causing said applications to be processed by said banks."

Well, let me stop there.

In her opening, the prosecutor told you that there is no claim here that Mr. LaMorte submitted any of these applications to his bank. So the indictment

was wrong in that respect. And certainly loosely and carelessly put it in. He never submitted any applications to his bank, the National Bank of North America. And then it went further. Same paragraph, it says -- you notice how the folks sit there writing when I am talking and unfortunately I won't be able to do any writing to answer them --

MS. HYNES: Your Honor, I object to that,
and I don't like to interrupt Mr. Drescher but if he'd
keep his remarks to ones that are proper and not improper,
I wouldn'thave to object. He is well aware of that.

THE COURT Mr. Drescher --

MR. DRESCHER: Unfortunately I can't answer the government so when they are up --

THE COURT: That point has been made, sir. Just go forward.

MR. DRESCHER: It then went on, that Ramos and Mr. La Morte would receive fees for Nisnewitz.

Well, that hasn't been proven. Nobody came close to proving that. You heard Mr. Nisnewitz says, "No. I never gave them anything." You heard Ramos certainly say he never gave anything to Nisnewitz, Nisnewitz never gave him anything, and they call them fees, and as far as any arrangement between Ramos and Nisnewitz, we will go into that later.

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That's the whole indictment.

MS. HYNES: Your Honor, that is not the whole indictment.

THE COURT: I know. That is a matter of argument and I think that you will have --

MS. HYNES: Well, that's a serious misstatement, your Honor, to this jury, and I think that it is not fair to the government at this point.

THE COURT: I regard it as argument.

MR. DRESCHER: What did I say?

THE COURT: He may comment on the scope of the indictment.

MR. DRESCHER: You mean I failed to mention the overt acts?

THE COURT: Mr. Drescher, please, I am addressing government counsel. I am saying that government counsel in her summation may speak to the jury on the full scope of the indictment.

Let us go forward.

MR. DRESCHER: One thing is certain, Mr. La Morte didn't deliberately violate Section 1014 in a substantive manner, in other words, a loan, such as the first six counts of this indictment, or if he had they'd have named him in these -- that type of count. So he is only charged

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here in the conspiracy. You know he had nothing to do with Dare To Be Great which is supposed to be part of the conspiracy, or submitting any fraudulent loans to any bank. Nobody said a word to that effect. I want to tell you folks right now, in every case, no matter how long it goes, there is always a few words that come in, a few bits of testimony, that decide the whole case. And in this case we heard it, we heard them from a man who concededly was a liar, Mr. Ramos, he admitted that. He admitted he was seeking favor at the hands of the government, he hoped for consideration; and there are two things he said which decide this whole case; and I am going to waste a little more time talking about other evidence but these two bits of evidence decide this case.

And here is what I mean: He testified on the trial here, in which he said that when this man Ramirez came to his office, and the loan went through, and the money was paid, that Ramirez said "Will \$60 or \$70 be all right?"

At which point he testified "I was surprised."

I hope you rememberthat. And if you don't remember any testimony you have the right to ask the Court to have it re-read.

The most important testimony in this case. He

2 says "I was surprised."

Well, this man was supposed to have been working with somebody to get 5 per cent on these loans that he put through. No question about that. You heard it. You heard it. You heard it from several witnesses.

5 per cent, Ramos' fee, Ramos' charge. When a man offered him a few bucks he said "I was surprised."

And what did he do? The man left, went, and the man testified he went outside. In the statement of either the FBI or the grand jury that is in this record. And there was talk between floors, upstairs, downstairs, the money was paid.

And then Ramos said "I called up Mr. La Morte and I told him I got a few bucks, \$70."

I think it was \$70 "and I said 'What about it?'" or words to this effect, and he said "You shouldn't have taken that."

And then he went on "But if you got it, hold it."

Now, don't you see how that decides this whole

case? So there wasn't any arrangement with Mr. La Morte

and Mr.Ramos concerning paying money or getting money,

and I am not even talking about fraudulent applications.

Neither of them knew it. That's the testimony in this case.

And Ramos admitted it. Oh, he tried to hem and

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he tried to get off the hook, and he said "Well, I suspected that there might be something wrong."

You can't send a man to jail for suspicion. That's the law.

MS. HYNES: Objection, your Honor.

THE COURT: No, I regard this as argument.

MS. HYNES: Well, your Honor, when he says you can't send a man to jail --

THE COURT: Well, suspicion.

MR. DRESCHER: I withdraw that. You can't convict a man. I assume that's what's criticized. You can't convict a man.on suspicion, or guesswork, on maybe, on it could be. And that's the basis of this whole case with the government.

All right. Now, if Mr. La Morte was working with this 5 per cent guy, would he have said "You shouldn't have taken that?" And this is from a witness who was -- he was looking to kill us to gain favor with the United States Attorney's office. So he didn't say that to help his old friend, Mr. La Morte. He was looking to kill us at the time.

Now, those two facts, if you forget everything I say to you, remember those two. There wasn't any deal, certainly as far as La Mortewas concerned, with Nisnewitz

or Nisnewitz with Ramos, there was no talk of that, although the witnesseshad said that I think that Mr.
Nishnewitz said to us that this man Ramos gets 5 per cent.

And you remember this: Even though they said that, the one witness testified that he saw a guy by the name of Skelly at the bank and he said Skelly was the man that was to get the 5 per cent, and somebody else said there was another branch of the National City Bank on Church Street where the man was to get money. That's this whole case, the whole case.

Let me go a whole lot further. Let me stop right now. Apparently, and I will discuss Miss Prenclau's testimony, it is incredible. It is incredible for the government to ask you to convict any citizen on the testimony of this woman. It was day in one instance, and it was night the other. She changed that testimony so completely, and it wasn't done in cross examination.

Nobody confused her. It was her own story she told.

She told a story to the FBI, you remember, in which ---, the story then was that she was supposed to send a \$50 money order to Queens Village, and she good the name, the last name.

Whoever heard of accepting a money order made out to La Morte. And Mr. Nisnewitz is supposed to have

And then she testified on the trial that no, she didnt' send it, she gave it to Mr. Nisnewitz, this money order. And that's why I brought Mrs. La Morte here. She picked up the mail.

stood right next to her and told her about it.

And if there was, I want to tdl you something, you know we got a pretty good FBI, believe me, and if there was any money order for \$50 with the name La Morte on it, you can bet all the tea in China it would have been here as an exhibit in this case. And this woman, she got the money at the First National City Bank. And she had 300 in cash in her pocket. If she was going to get a money order, isn't it a fact that she'd have got it at the bank and wouldn't have walked out to an apothecary that she never heard of, that she didn't know where it was?

And if it wasn't an apothecary, she thought it was a check casher.

On top of that she testified -- this is something else that's incredible, on the trial, that when she got home, Nisnewitz was in her entranceway to her apartment, and at this time he asked her for a money order. That was her testimony. If I am wrong correct me and you check it out. You have a right to.

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He asked her allegedly for the money order then, but then she testified that after she left the bank before she got home she got the money order here at an apothecary or at a check casher.

You can't convict people on testimony of that nature. That's what the word reasonable doubt means.

We discussed Mr. Ramirez. As far as he was concerned, there wasn't any question in this case by Ramirez or by Nisnewitz or anybody else that Ramirez was sent to Ramos by Mr. Nisnewitz. He didn't deny it, I don't believe.

But when our friend Ramos took the stand, he wanted to make sure that he'd get every break he could get after his plea of guilty, and he gave his testimony that it was La Morte and Nisnewitz referred Ramirez to him.

Ramirez testified he never heard of La Morte,
never saw him, had nothing to do with him, but Ramos wanted
to get the needle in there, anything he 'd get a better
break on his sentence.

Another thing, I don't know, first two witnesses were these two men from the banks to introduce the records, fellows by the name of Slutsky and Reilly, and one of them appears had a long interview with those and what happens afterwards and so the gentleman I had this morning, Mr. Flister,

a fine gentleman, and let's clear him up for the moment.

You remember his testimony. I don'thave to refer to it at
length. On the other hand, this guy, La Morte, had a fine
reputation in the bank. At the beginning of '72 there was
an investigation. He continued on to work until February
l3th of this year, which followed the filing of this
indictment. And I think it's reasonable to assume that
a bank, they are very careful of the reputations of their
employees, under indictment as Mr. Flister said, at
that point our friend La Morte was given a leave of absence, because he was indicted in this case.

So if he had committed any wrong in his position in the bank, and there had been an examination and an investigation back in the beginning of '72, you think they'd have let him continue to work in this bank, the National Bank of North America for another two years? If he had done wrong he'd have been fired and out on his ear. No question about it.

I started to say, these people will check up loan applications. It goes, he said, to the main office and they have investigators checking them up.

Do you think that Mr. La Morte would have had anything to do, knowing it was a phone application, and that's this conspiracy, that's what the conspiracy charges.

gross salary was \$8,000.

up a few bucks. I am not going to hold out any opposition to that. Maybe its true that he recommended business to his relative, who is married to his wife's

said so, and it was turned down here, and if he was doing wrong, and if he was violating Section 1014 of the law, and if he was committing a crime, andknowing he was committing

cousin, Mr. Ramos , for one reaon or another Mr. Flister

This was a dedicated banker, 18 years he worked

And right here I will say to you, maybe he did pick

for this bank, even though you heard after 17 years or so his

"Listen, I send some applications when we can't handle them over to Ramos, the First National City Bank?"

a crime, do you think he'd have gone to Flister and said,

Does that make sense? Would he have told his
boss if he knew he was committing a crime and a serious crime
a felony, would he have told this gentleman, "I am sending
them over" and then when Mr. Flister says "Well, you better
not or you shouldn't", I assume it ceased. There is no
evidence to the contrary. Does that make sense?
How could you hold otherwise if he was in a conspiracy,
a criminal venture. Working with Nisnewitz, Ramos,
knowledge, phone applications, going in, false statements.
You think he'd have said to his boss "I recommended --

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I send some cases over to Ramos?"

It's a shame that we have to even go into this at such great length.

Now, a lot of evidence is in this case. Mr. Ramirez, he sprung for 70 bucks. He mentioned that to you a while back.

And I am not going to even discuss it. If Ramos said "I walked over and gave La Morte \$35 out of the 70," I am not arguing the point. I am not arguing the point. After all, maybe if it was paid, because if this gentleman, Mr. La Morte, knew that a phony application had been placed there, he deserved to be convicted.

Is it possible he got the \$35 because he might have been innocent and didn't know that? Of course it was.

He did things to help this Ramos, a younger banker, friend, distantly related by marriage.

He sent over an application to him. And a guy walked in with 70 bucks. So he got \$35.

Don't forget this: If you hear 1014, Section 1014, that doesn't condemn getting a gratuity. That doesn't condemn getting a few bucks. That doesn't condemn getting a present. It says filing false applications. Nobody says La Morte did that. Keep that in mind, please. And then let's assume Ramos got a few bottles of liquor. I don't

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thinkhe split it with anybody but that wouldn't violate 1014. 3

In other words, it might be a crime for a banker to take a gratuity or a few dollars. On the other hand, that's not the crime charged here. You must only decide this case under the indictment before you, and his Honor will tell you that.

The fact that there was a few dollars spent back and forth, I think then the evidence was too, this whole big case, "\$35," Ramos said "I gave La Morte, and La Morte gave me 15 bucks. He said he got it from Prenclau."

I don't know whether he did or not. I don't care if he did. I won't argue that he didn't; although it's tough for me to understand Ramos' story here that he said to me, said Ramos, that this woman had had a previous loan with the Bank of North America."

If there was any such evidence in this case, that application for the loan would have been here so fast you'd have had it shoved up your nose. The FBI would have it here. We got a pretty good FBI.

So she said she never met Mr. La Morte. Maybe she was a liar, because I think all of these witnesses were liars, as far as I am concerned. None of them here told

the truth or none of them knew how to tell the truth. They were all confused, and when I get in a little further, you get their grand jury testimony and FBI statements and the testimony they gave here, it a ridiculous thing to expect to convict a man on such nonsense, such confusing statements.

And then this man Ramirez, after years, the testified here that he was sitting next to Ramos, and he heard him say on the phone, "Mr. Thomas," and then there was a line -- I assume that there should be a line in the record. I assume that there was a line there for that. He testified that when he gave Ramos the 70 bucks, he left. The word was outside. He went outside. And yet he sat here and testified that he heard the name Mr. Thomas, and then he went further here and testified here that the name was La Morte.

Let me show you something. Remember this testimony was given? May 2, 1974, that's when he testified here. On February 3, 1972, that was the loan. On April 7, two months later, that was when he gave the statement to the grand jury.

No, he appeared before the grand jury on August 21, six months later. All right.

In the FBI statement, even though he heard La Morte, hears what he said to the FBI when they questioned him, two

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pages from the end, "Ramos made a phone call to some other bank and mentioned my name."

That was given two months after. Does that sound as if Ramirez -- even that he recognized him? If you were sitting next to a man, let's assume you were sitting there, you heard him making a phone call, you don't know if it's got anythin- to do with you. You are in a bank. Would you recognize that man's name years later? Of course not.

He appeared before the grand jury six months later, and here is what he said, he gave \$70 to Ramos outside.

"I had no choice." I am quoting from the grand jury testimony of this Ramirez.

That's on MTC-3 if you are interested.

MS. HYNES: That is not in evidence, your Honor.

THE COURT: Well, if he asked him those questions.

MS. HYNES: He didn't. He is simply quoting from grand jury testimony. It is not in evidence.

MR.DRESCHER: Of course it is in evidence.

I questioned the witness on it.

THE COURT: If he was asked about those specific questions they go into the record through the testimony.

MS. HYNES: If that's the questions he says he

2 asked that witness.

MR. DRESCHER: I assure your Honor that I asked the questions of the witness.

THE COURT: Go ahead, Mr.Drescher.

MR. DRESCHEP: This witness went on to say too, further, before the grand jury, Nisnewitz told he had to split with someone else. The original banker had the heat on him, and this other banker worked for the First National City too, at a different branch. He would have to split this with somebody else.

What is this? What different branch? I have heard more names here, Skelly, who is at the First National City Bank, that one of the witnesses says he is the .

5 per cent guy there. He is not in this case at all in my opinion. Never was named in it. Then there was talk by some witness that Nisnewitz told me that the First National City Bank at Church Avenue or Church Street, Church Avenue, I guess, that that was one of the banks.

I want to show you how unfair this case was prepared and presented. Grand jury, this Mr. Rowland,
the matter of the leading question, and you know what a
leading question is in the law? If I ask a question that
contains the answer or suggests the answer, that's unfair.
These people appeared before a grand jury. They have no

lawyer there. They are not allowed to have a lawyer there. And if you should have a leading question in them, sometimes you can accomplish results. Look at this: Here is what Mr. Rowland, who he asks -- spoke to this witness -- I am talking now about on the phone with La Morte -- "Did you hear him speak to that person by first name?

"A He mentioned his name but it's a long time ago. I don't remember."

Now this is six months later. Now, get this, the next question "Does the name Thomas La Morte mean anything to you?"

See he says he don't remember the name at all.

But then he shoves it in on a leading question. Now
that's unfair, and that's now way to prepare a case.

At which point the witness says, "A Thomas, it was Thomas."

And you have, as I got done saying a few minutes ago, of course the guy put the name in, and after that on this trial it became La Morte.

I am going to show you four or five other instances where this Mr. Rowland, whoever he was, did the same thing in the grand jury room.

He testified Thomas, he said he heard him say Thomas and when I questioned Ramos about that phone call,

and throughout the grand jury testimony, and I read it to you, a good part of it, he kept calling him Tom and the FBI said Tom Tom. This is what -- why not a friend? If you and I have a friend Thomas, of course we will call him Tom when we are together socially. All right.

Now, however, which I asked Ramos, I said, did you call Tom on a direct line?

He said yes.

But then when he realized the bind that would put him in he said no, it had to go through a switchboard. But even if it went through a switchboard, is he kidding?

I'd pick up the phone and say let me speak to Tom La Morte.

I wouldn't go into a production number and give it a

Mr. Thomas something or other; which I am speaking to an old friend, a guy that sent him business.

One of the witnesses said he sent him for points.

I think that's what Nisnewitz said, which was a fact, he sent him for points. That is, Ramos probably got credit for putting through applications. He is a young man.

THE COURT: Mr. Drescher, would this be a good point to take a short recess?

MR. DRESCHER: Wonderful, sir, I would appreciate it very much.

THE COURT: Ladies and gentlemen, we will take

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a recess for ten minutes.

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(Recess.)

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THE COURT: Mr. Drescher.

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MR. DRESCHER: Yes, sir.

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Let me comment in this case, and I tried to figure out what is all this difference, all this contradictions on the witnesses, between the statements they might have given the FBI, between the testimony they gave the grand jury a couple of years ago, and the testimony they

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And here's another example that we might consider in deciding how these things came about.

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Let me quote to you from Miss Prenclau's testimony in her statement to the FBI.

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"On January 31, 1972, Nisnewitz came to my apartment. In fact he was waiting in the hallway for me.

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He asked for a hundred dollars in cash and a money order for \$50."

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So you see I was right. In the apartment he first asked for the money but she says she got it in the apothecary or somewhere when she left the bank to come home.

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All right. I didn't raise that for that purpose.

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"I bought the money order and sent it to a man in Queens Village. Mr. Nisnewitz said I should send the money order and the copy to the man in Queens Village. I did this. The man's name was a French sounding name."

Now that was the statement she gave, but right after "I bought the money order and sent it to a man," you will see there was a parenthesis and a caret -- this is in the handwriting fo the FBI man -- "a Mr. La Morte, I believe."

You see she said a French sounding name. She didn't know the name La Morte but it came into that when the FBI manput it in that statement and with a caret and -- yes that statement is in evidence, isn't it; sir? believe it is attached to the grand jury minutes.

THE COURT: My recollection is that there is testimony with regard to --

MR. DEESCHER: And I daresay that the jury can see it and that I am not misquoting.

THE COURT: -- to the fact that there is an interlineation.

MR. DRESCHER: So it was the FBI guy that stuck Mr. La Morte in, not Miss Prenclau.

Let me go a little further. She testified before the grand jury with our friend Mr. Rowland conducting the

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examination, and he said to her, page RSK-4:

"Q Do you recall a man that you dealt with as having the name Ramos"; That's a leading question you heard that. That's the name.

"A The name. It was a man. That I know. And a woman called me over, 'You're next,' and I stood in line and waited. And I went to this person, I gave him the envelope, and that was all."

Of course Ramos testified he denied there was any woman in the bank who performed that duty of directing people lined up waiting to see a loan application taker or a loan representative, and say "You're next" and have him go. He denied that, in his testimony.

You know, you heard about the money order, the whole story of the money order, I am sure.

Question by Mr. Rowland on RSK-5:

"Q Who was the money order to be made out to?

"A French name. D-E something."

D-E, his name is La Morte, D-E something. Then the next question by our helpful Mr. Rowland:

"Q This was the man's name that you gave to the FBI as'La Morte'?"

It got in.

"A La Morte, yes, it sounded French to me."

That's how these things are done on occasion. It is unfortunate.

Then Rowland continued:

"Q Where were you supposed to send it?"

And at this point she said "No, I gave it to Nisnewitz."

That's in the grand jury, a long while ago, and I don't understand it. At that point she had also said something about the fact that she was told to send it to a place in Queens Village and she got the name La Morte and sent it to Queens Village.

What are we going to do, convict people on testimony like this? I wouldn't convict a war criminal on it.

You know, all of the witnesses who testified here, all of them said yes, they read their story twice, once or twice, grand jury testimony and statements, and met with the prosecutors on occasion, and I don't blame them for that. They are lawyers such as I am. You look to win a case for your side, and you had to prepare it. That is your job, to prepare a case.

But a lot of these witnesses were prepared, and they gave testimony which was -- it was not the fact.

They didn't rely on their recollection of what happened.

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This is a long time ago, two and a half years ago. They relied on Mr. Rowland's help before the grand jury and the FBI guy putting in carets and putting names in.

Let me see, there is something else here, while I am thinking of it, that's in the record, and I will show you what I mean again, if I can find it.

Well, it had to do with the testimony of the witness who was recommended by Mr. Ross. He gave testimony in this case and he testified before the grand jury, that "The man's name who sent me there was Mr. Ross. I don't know his first name."

And then came back our friend Mr. Rowland, and said -- here it is, page five of the minutes of Roger La Ferla:

Who gave you the information about contactinghim?" "0 meaning Nisnewitz?

The person's last name was Ross. I don't know "A his first name."

That's pretty definite.

"Q Was that Allen Ross?"

That's not fair. It is no way to handle a witness without a lawyer before the grand jury.

And again the man said this time truthfully "I don't know his first name. I only knew him as

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Mr. Ross."

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I could go on here at great length, but I am going to try and shorten it and I hope I will be through here in 20 minutes so as not to hold you folks up when the government speaks to you.

Ramirez now had his loan approved, and Ramos testified, "I didn't ask for money, and La Morte didn't ask
for money."

Now, if he was a 5 per centiguy, under an arrangement such as we heard here, he would have asked for money. He also testified, and I am sure the government will make much of it, that Mr. La Morte offered him money to approve the Prenclau loan. I think that what the testimony was, something to the effect that "There might be something in it for you," when the government opened or -- but let's assume that he was to get a few bucks. I cannot do more than come back to the one important point, 1014 doesn't say anything about getting money. You could get all the money in the world you wanted, and it wouldn't violate 1014. It had to be predicated on the fact that somebody knowingly, in this instance my client, gottogether with other people and knwoing it, they wilfully and deliberately and criminally put in phony applications to banks to get loans; and if they

didn't know about it they couldn't be guilty of this crime, and they couldn't be guilty of conspiracy. Simple as that. Nobody says that he did know it.

Now Mr. Ramos, without any help here or any claiming that Mr. La Morte was in with him, testified, "I expected some money for processing loans."

And shortly after that he says yes, he admitted he lied to the grand jury, and I say to you now, if he lied to the grand jury why shouldn't he have lied to you people? He had no scruples about it certainly.

One of the most important other things that Ramos said, and mind you he was a witness looking to kill my client at this point, he wasn't looking to help him, that's a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language: It was a sure thing, and he conceded in this language. It was a sure thing, and he conc

I did mention to you he refused and refused and he said "Well, I suspected there was something wrong with them" -- this is Ramos -- and I pinned him down and

I made him say that he had no knowledge there was anything phony in these applications in his testimony. If that was so, there is no more case. The conspiracy was to submit phony applications knowingly. And forget about a few bucks, a gratuity, a little payment, grabbing a few bucks to supplement an \$8,000 gross yearly pay. Maybe he did look to grab a few bucks. Maybe he did. I'm not going to argue that point. The government will argue it end say "Well, if he took money he must have been guilty."

There is nothing like that at all. Because every witness says he didn't know anything about this crime that he is charged with.

Now another thing that the government will probably stress here. Mr. La Ferla and Mr. and Mrs. Walther that Nisnewitz said "If Ramos is not there, if he is on jury duty, you call up Mr. La Morte to find out if the loan went through." And they are going to tear their hair out. This proves that Mr. La Morte was in on this whole swindle. Phony applications and giving it. Nothing of the kind.

You can understand this. La Morte put Ramos in with Nisnewitz. We admit that. La Morte was a banker looking to get business like all of us would if we were in a business. La Morte was looking to stay friendly to

have Nisnewitz possibly refer business to him. Not phony applications, business like Basmagy Company, legitimate business, even though the loan was turned down.

And now they call Mr. La Morte up. So what?

He said the loan was turned down. He did him a favor.

He called up his friend's office, his friend's bank. That didn't prove he was in on a conspiracy to file false applications. He was doing a courtesy. Maybe he was looking to ingratiate himself with Nisnewitz as a further customer just as I am sure Nisnewitz was looking to make contacts with these different bankers, whether it was legitimate or not, I have nothing to say for or against Mr.

Nisnewitz. He had a very capable lawyer, and I hope to God that anything I say will not be construed by you as my belief as to his guilt or innocence. I have nothing to do with him.

But it is perfectly sensible. Sure he was looking to make banking contacts and he made them. Bankers Trust and Westphal's bank, Hanover, Manufacturers Hanover, National City, Church Street, Mr. Skelly, nothing wrong about that.

He was a man in the accounting business looking to put through loans, legitimate loans possibly. The greatest answer I ever heard in my life in that court of

law, and I have been at this game all my life, too long, was when my friend Mr. La Ferla said he wasn't going to join Dare To Be Great or the pyramid business for money, he was going to join it as a philosophy. Of course I only comment on that, it struck me very, very funny.

Now we are going to come to something else, the grand jury testimony.

The government is going to grab that and say
this man La Morte, he mentioned five dollars that he got
as a gratuity, but the terrible liar, he didn't mention
Ramos' \$35 and he didn't mention giving Ramos \$15.
Therefore he is guilty of this conspirarcy. That's hogwash.

Suppose he did. Now mind you here is the picture. There had been an investigation. 18 years or so as a banker. And nothing was wrong because he continued on as a banker for two years or so after, so they didn't find anything wrong, but he might have panicked. He knew that there was some rule that a banker shouldn't take a few bucks as a gratuity. The bank's rule was you could take a present but not cash. And he was called before the grand jury.

Dedicated man. He is in business and he got scared to death. So maybe he did say to the grand jury "Well, I didn't get anything, I didn't get a few bucks. I didn't get any money." They didn't ask him about

the \$5 incidentally. They just asked him generally, as you will see, "Did you ever take anything from anybody?" Did you ever take anything from Ramos? And he said no.

Maybe he lied to the grand jury. I will go that far. Maybe he misstated. But you have to answer this:

Did he misstate because he had put in false and fraudulent applications? Or did he misstate because he was scared to death he might lose his job for having taken a few bucks?

Unless you are convinced beyond a reasonable doubt, and that's the test here, that this man misstated to the grand jury because of his guilt in the conspiracy to put in phony applications, with wrong statements, unless you are convinced of that beyond a reasonable doubt, you must acquit him, even if you and I believe, and I am his lawyer, that maybe he did take a few bucks to supplement the great big payment of \$8,000 gross after sixteen years.

Maybe he did take a few bucks. Maybe that's a crime.

But it's not the crime charged in this indictment, and that's what you must decide. That makes sense, doesn't it?

I don't know what else the government -- you see, unfortunately the government has the last word.

I don't know what they are going to say to you. I tried to point out the only possible arguments they can give

because they can't say that La Morte knew definitely that anybody got a phony application. None of them went to his bank.

And whether he cooperated with Ramos to present
them to the First National City Bank, the evidence is all to
the contrary, and Ramos himself says that he had no knowledge
that the applications were phony.

And another thing, if this man La Morte was of a criminal nature, and he was looking to deliberately file false bank statements contains false information, wouldn't he have put them in his bank? He could have done that and if there was any money in it he could have stuck it in his pocket instead of possibly going to Ramos.

Miss Prenclau I think testified to something.

There was never an application submitted to the bank of North America, please believe that. There was one statement made by I think it was Ramos, that this lady Prenclau -- Nisnewitz told you -- it was Nisnewitz who said you take this application -- I don't know whether it was an application, I don't recall this -- he said "Yougo over and see Mr. La Morte" and she came back and said Mr. La Morte said "I can't do anything with it."

Whether Miss Prenclau was telling the truth or what or whether she was crazy, I don't know, because she said in

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her direct testimony here she never saw this man La Morte
in his life. But if she did take it over there is no
question he never submitted one application to his bank. If
he was in the business to look to do something illegal as a
criminal, in conspiracy with this man and with Ramos, he
could have used his own bank too. Never did.

Let's see, one more minute I will take.

We are charged with a conspiracy here, confederation, agreement between men. They get bgether, not sitting down at a table but something, they got to get together and say let's do this, let's rob this bank. Let's stick up this They got to get together. It's an agreement. place. They got to be together, mustn't they? There is no question about the evidence in this case, this man saw Ramos He saw La Morte once in his bank. What is this never. nonsense about conspiracy here? If you hear it's a corrupt agreement you ask yourselves when was the corrupt agreement entered into? When was it made? Go into your jury room and never forget the two things; that Mr. Ramos told you and told the Court here "when the guy offered me \$70, I was surprised."

So there was no deal there that he was to get 5 per cent as some of the testimony was that Nisnewitz told him through these witnesses he was to get.

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And then if he was in partners with this man

La Morte, for the love of God would La Morte have said to

him "Gee, you shouldn't have taken that:" But if you got

it hold onto it."

At which point he voluntarily turned around some days later or so later and walked up to the bank and gave him 35 bucks.

If you ladies and gentlemen feel thatthis man should be ruined --

MS. HYNES: Objection.

THE COURT: I will allow it.

MR. DRESCHER: Objection? I withdraw it.

THE COURT: Go ahead, Mr. Drescher.

MR.DRESCHER: That he should be ruined, stamped a criminal, on testimony such as you heard here, on the conspiracy that had to be one thing, filing false applications for bank loans, remember you got to go home tonight and sleep; and you should do the right thing, if you do the right thing and satisfy your conscience nobody can criticize you and you can live with yourself, but please in this case, you can't find Mr. La Morte guilty of the indictment here charging conspiracy.

Thank you. I have too long altogether.

MS. HYNES: Ladies and gentlemen, I know it is

late in the afternoon, and you are tired and we are all tired.

But this is a terribly important case to the government, and it is terribly important to both of the defendants on trial here. So we are going to ask you to pay close attention while I speak as well so the government has its opportunity to tell you what it thinks it has proved here during the last several days.

I want to thank you for the attention that you have given during the course of this trial, there have been some days when we have sat very late and we appreciate your attention throughout the trial.

This is a very important case to the government. The government's responsibility to enforce criminal laws.

You heard Mr. Drescher make accusations that the United States Attorney's office is all but suborning perjury on that stand. It is the duty of the United States Attorney's office to see that the criminal laws are enforced and that the reason that we are here is to present evidence to you, and you make that determination.

Our job is to present the evidence. Your job is to determine the facts. The judge's job, if you determine that the facts are that these defendants did violate

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federal law, it is for the judge to deal with the sentencing.

You have taken an oath to decide the facts in this case, and that is your solemn obligation. You are not to decide it on the basis of sympathy for the defendants, you are not to decide it on the basis of personalities in this case, whether you like one lawyer or dislike another lawyer. You are to base it on the facts in this case as the evidence has been presented to you, and you are to sift that evidence.

The reason why we have a jury system is that people such as yourselves will listen to evidence and decide what's important and what's not important.

Now you have heard a great deal said in the summations by Mr. Friedman and Mr. Drescher as to inconsistencies.

Well, one of the most important functions of a jury, and almost the most important function, is to separate out what's important and what's not important.

What inconsistency, if you find there was an inconsistency, was it an important inconsistency? Did it go to the guts of the case? That is a very important function of yours; that you must bring your common sense into this courtroom, that you have to view all of the evidence, and not separate out one little piece of evidence, and if you find an in-

consistency, say, "Well, en, the whole case has to fall apart." It may not. It may, if you find that that is a crucial piece of evidence, but may not.

You have to determine what is important. You have to determine if these witnesses were telling the truth. You have to determine if the government put these witnesses on the send and told them to lie. Because that's what's been suggested here today by Mr. Drescher, that the government was terrible in preparing this case; that the government put witnesses on the stand that you couldn't believe.

Well, you may find that that's not the case.

It is very important for you to separate out what's important and what's not important, and how all of the evidence hangs together. And sympathy isn't your function. You have taken an oath to decide the facts. That's your job. Now let's turn to the indictment in the case and to the government's proof.

The indictment in this case charges two of the defendants with a conspiracy, and I am going to ask your indulgence while I read the indictment because it occurs to me that a great deal has been said about what the indictment charges, but it has never been read to you. You don't know what the government's indictment says, so I am going to ask your indulgence and read the conspiracy part

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of the indictment to you, and then I will continue on with what the government's case is.

Now I am going to read Count 7 of the indictment: "Count 7: The grand jury further charges from on or about January 1, 1971 up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, Harold Nisnewitz, an accountant, and Jose Ramos, Jr., who at all relevant times was a loan officer of the First National City Bank, and Thomas La Morte, who at all relevant times was a loan officer of National Bank of North America, the defendants, and Natalie V. Prenclau, Roger La Ferla, Gustavo Ramirez, and Johnny Rodriguez, hereinafter loan applicants, and named herein as co-conspirators but not as defendants, unlawfully, wilfully, and knowingly, did conspire, confederate, and agree among themselves and with other persons to the grand jury known and unknown to commit offenses against the United States, to wit, the violation of Title 18 United States Code, Section 1014, by making false statements, reports, and wilful over-evaluation of property and security in connection with loan applications submitted by said loan applicants and others known and unknown

Manufacturers Hanover Trust, National Bank of North America,

to the grand jury to the First National City Bank,

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and others, all banks the deposits of which were then insured by the Federal Deposit Insurance Corporation.

"A: It was part of said conspiracy that said loan applicants and others known and unknown to the grand jury, would seek bank loand and invest new funds obtained thereby in Dare To Be Great, a pyramid selling program.

B: It was further part of said conspiracy that defendant Nisnewitz would charge said loan applicants and others, known and unknown to the grand jury, a fee ranging from approximately 100 to \$\$150 to cause loan applications containing false information to be prepared.

"C: It was further part of said conspiracy that
the defendant Nisnewitz would refer said loan applicants
and others known and unknown to the grand jury to the
defendant Ramos at the First National City Bank and to the
defendant La Morte at the National Bank of North America.
for assistance in causing said loan applications to be
processed by said banks and that defendants Ramos and
La Morte would receive fees from Nisnewitz and others."

Then there are overt acts:

"In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

"On or about January 6, 1972, a loan application

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was submitted by Natalie V. Prenclau to the First National City Bank.

"2: On or about February 3, 1972, 2, 1972

"2: On or about February 3, 1972, a loan application was submitted by Gustavo Ramirez to the First National City Bank."

A conspiracy is charged in that indictment, in that
7th count of the indictment, and the defendants are
also charged under a different statute which is the statute
called aiding and abetting and the judge will charge you
as to that. Basically anyone who aids and abets another
in the commission of a crime is also guilty of the crime.

Much has been said about conspiracy and the Judge will charge you on the law as to conspiracy.

Conspiracy is an agreement or an understanding between two or more persons to engage in conduct which is unlawful. Now it is not as Mr. Drescher suggests that all three of these defendants had to physically be present in the same place and enter into a formal agreement.

I mean, you as people who are possessed of common sense would find it very peculiar, wouldn't you, to find that people are sitting down making a formal agreement to commit a crime? That's not how things operate in daily life, and that's why we are asking you to judge these facts because you have to bring to this courtroom your common sense.

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How do things operate? What is the common sense approach? What really did happn?

A conspiracy is like a partnership; but it is a partnership in crime. The usual partnership is when two people will get together and maybe they want to open a store, but a conspiracy is different.

A conspiracy is when the partners combine to do something unlawful; and the word unlawful is the key.

A conspiracy is an illegal partnership. Its:
purpose is illegal. And as we submit to you, the evidence
in this case shows that the defendant La Morte, and
Nisnewitz, were in a conspiracy, a partnership to submit
false loan applications to banks.

Now again I want to focus to the word agreement.

This does not have to be to formal agreement. The

government is not required to come up with a formal document saying "This was what we agreed." The government
is not required to point to a date and say "This is when the
agreement took place."

You have to consider all of the eivdence in the case and see if it fits together that what in fact was going on here was an agreement, albeit informal, but there was an agreement among these three defendants, to submit false loan applications to the bank.

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You can infer that from all of the circumstances in the case, and what were the circumstances in this case?

First you have the defendant Ramos. The defendant Ramos has pled guilty to this charge in the indictment. He has pled guilty to conspiracy to submit false loan applications, and he was charged as a member of that conspiracy.

He took the stand, and testified.

Mr. Drescher would have you believe that Mr. Ramos lied on that stand from beginning to end except when it helped his client. Then he would concede maybe he was telling the truth.

But if it came near to hurting his client he must have been lying.

And he said Mr. Ramos lied in the grand jury. Well, Mr. Ramos admitted on the stand he did lie in the grand jury. But Mr. Drescher also admitted that Mr. La Morte lied in the grand jury, and you can't have it both ways. Mr. Drescher suggests that Mr. Ramos got on that stand, with the government's help, lied throughout.

Now let me ask you, when we talk about common sense, Mr. Ramos pled guilty, he testified that he pled guilty before Judge Owen. Yes, he said, "I hope that I get some consideration when it comes time to sentencing."

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What is he going to get consideration for.

testimony before the judge who is going to sentence him?

Does that make sense to you? That this witness is

going to get on the stand and lie in front of the very

judge who is going to sentence him?

Do you remember in response to a question by Mr. Drescher, when he was asked, "Well, what promises were you told by the government?"

Mr. Ramos said, he was told to tell the truth.

And that's what he was told to do, to tell the truth.

He may have lied in the grand jury but he wasn't lying up there because at this point he had pled guilty.

The only thing that he had going for him is if he testified for the government, told the truth in front of the judge who was going to sentence him, that was his last chance.

Doesn't that make sense? Do you think this man is going to get up there and perjure himself and do you really believe as Mr. Drescher would suggest, that the United States Attorney's office was coaching him to perjure himself in a case? Is that important to the United States Attorney's office?

We don't suborn perjury. We prepare witnesses, yes, we talk to witnesses; it is our duty, We represent the government in court, we have to give the government

the best representation possible.

Part of that representation is talking to witnesses, find out what the facts are. If they testified in front of the grand jury, if they had given a statement to the FBI, they are given those statements to read. That's only natural.

As you sit here today, what's today's date, May 8th?

If you think back four months ago, can you tell time, place,

and how many days inbetween different business appointments
you had?

Mr. Drescher and Mr. Freidman were trying to bring out, well, they were requested by the FBI in April and these events took place in June and there were inconsistencies.

What are we talking about? What are the inconsistencies?

The inconsistencies are days, dates. Are dates important here? Did Ramos deny that he received any of these loan applications that have his initials on it? "No.

Did Mr. Nisnewitz deny he typed all of these loan applications? No. That's what's important, not what day they went into the bank, as the defense counsel would have you believe.

I mean whether Mr. La Ferla went into the bank

on February 9th or February 10th isn't what we are taing about in this case. It is that Mr. La Ferla went into
the bank with a false loan application typed by Nisnewitz,
which Nisnewitz admits on the stand that he typed, which he
also finally admits on cross examination that he knew
that he didn't work for Joanna Graphics.

That's what this case is about, not when Mr. Ramos was on jury duty. Who cares whether Mr. Ramos was on jury duty and when he was on jury duty? The point is with respect to these applications, that Ramos took, his initial s are on them, and he admitted that on the stand and there can be no serious question about that.

And they got to Mr. Ramos through Mr. Nisnewitz.

And how they got to Mr. Nisnewitz who eventually
sent them to Ramos was through La Morte. So let's be
serious about what we are really talking about in this case.

I mean are we really talking about when Natalie Prenclauhad
her cold? How cares when she had her cold?

Was it the first time, the second time?

Let me point out one other thing to you. There's been a lot of testimony and a lot of argument about the testimony of Natalie Prenclau.

Natalie Prenclau took the stand. True, she gave a statement to the FBI in April. That statement was not

in her handwriting and she told youit wasn't in her writing. It was in the handwriting of the agent from the Federal Bureau of Investigation. I believe there is testimony that it went on for about six or seven pages.

And she read it and signed it, and where there were changes she made an initial. That was not her handwriting.

Now, there is a great deal of argument in this case about the money order. Was the money order sent, was it given? There is no dispute there was a \$50 money order because there was a \$50 money order.

MR. DRESCHER: I don'twant to object, sir, but there was no -- to say that there was no dispute I think is unfair.

THE COURT: I think that statement -
MS. HYNES: Strike that remark then from the statement.

Let us talk about the \$50 money order.

Natalie Prenclau in the grand jury when she was talking in her own words and wasn't asked to sign a statement somebody else wrote, when she was talking in her own words she said she gave Mr. Nisnewitz the \$50 money order.
When she got on the stand she said "I gave Mr. Nisnewitz the \$50 money order."

So when she is saying it in her own words and

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it is not being written out by somebody else, she's been consistent. She testified to that in the grand jury back two years ago and she testified to that now.

She gave Nisnewitz the \$50 money order.

She had been told the first time she went to see Nisnewitz that he wanted a \$50 money order; and remember she testified she gave Mr. Nisnewitz the entire money order.

So we have Mr. Drescher saying the FBI is so terrific they wouldcome in here with that money order. She gave the whole thing to Nisnewitz.

While we are on that \$50 money order, what other testimony do we have about the money order?

We have Mr. Ramos testifying that he received a call from Thomas La Morte, and La Morte told him he was going to get a money order from Natalie Prencalu.

So is Natalie Prenclau making that up? He was -MR. DRESCHER: Judge, he was going to get a money
order for \$15 was the testimony. I mean, I hope the "
United States Attorney doesn't misquote.

THE COURT: All I can say at this point,

Mr. Drescher, is that the jury's recollection of the evidence
in this case will govern. I am not prepared to rule one
way or the other.

MR. DRESCHER: Thank you, sir.

MS. HYNES: I haven't finished my comments on that yet.

Mr. Ramos testified that La Morte told him he was going to get a money order, and that he received a call and La Morte told him that he had received a \$15 money order and that he then received \$15 from La Morte in cash. Ramos never saw the money order.

What makes sense? Why is Natalie Prenclau lying?

I mean unless you believe with the defense counsel that
the government put Natalie Prenclau up to perjury? Why
should she lie about the money order whether it was \$15 or
\$50?

She even remembers paying 40 cents for it. What is her reaon for lying about the \$50 money order? Maybe Mr. La Morte has a reason to lie about the amount. Maybe he doesn't want Mr. Ramos to know how much that money order was for. Maybe he wants Mr. Ramos to think that all he was getting was \$15 which he was just passing along to Mr. Ramos, when in fact he was getting \$50 and was only willing to pass \$15 along. Maybe that makes more sense.

There has been a good deal of argument by Mr.

Drescher thatthis case doesn't involve La Morte. Well,
lct's see if it does.

You have three people in the conspiracy.

I am going to limit myself in the beginning here to conspiracy. Three people, Ramos, who's pled guilty, Nisnewitz and La Morte. And what is -- how does the evidence all hang together? What was going on here?

First thing that happens is that La Morte calls
Mr. Ramos and tells him that Harold Nisnewitz is going to
be calling him. And that is a phone call from La Morte
to Ramos. That is the beginning.

And he says that Nisnewitz is going to be referring people to Ramos. And Nisnewitz does call Mr. Ramos, and he says "Tom La Morte told me to call you. He is going to refer some people to you."

And he does refer people to Mr. Ramos.

And you heard the testimony from these people.

What are we talking about an innocent referral? These

people testified that they went to Mr. Ramos specifically

down at Canal Street after having gone out to Mr. Nisnewitz'

office out in Queens, sent all the way to a branch of the

First National City Bank down in Canal Street, to see Mr.

Ramos. They were told to see Mr. Ramos. It is true

Natalie Prenclau didn't testify that she was told to

see Mr. Ramos. She didn't remember. That's all she can tell

us, the truth. She didn't remember.

But the others remembered. They were told to see Mr. Ramos. Well, why are people --

THE COURT: Mr. Drescher, I think you have a valid point there as to her testimony.

MR. DRESCHER: Certainly the lady didn't testify she didn't remember, sir. She testified very clearly what had happened.

THE COURT: Yes.

MS. HYNES: I will say to the jury, your Honor, myself, as Mr. Friedman has pointed out, we are all human, and it is your recollection that controls; and if you disagree or you remember the testimony any differently, it is your recollection. If I misstate something it is not intentional.

I am dealing with my own memory, and it is your memory that really controls, and if you have any question you can have the testimony read back.

THE COURT: I so charge you and that is the fact; that you may have the testimony read back. Go ahead.

MS. HYNES: Let me just back up a bit and put in perspective how these people are getting to Mr. Ramos. They are coming to Mr. Nisnewitz from the Bronx, from Brooklyn, from out in Suffolk County, all to have Mr. Nisnewitz type their name, address and place of

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employment on a lona application? I mean, does that make sense to you, that they are traveling these distances to this man's office so his wife can type up a loan application?

And if they had all the information they were going to put in those loan applications before they ever got to him, why couldn't they fill them out themselves and go to a bank, if Mr. Nisnewitz you know wasn't doing anything but taking down information, their name and their address on a pad and then giving it to his wife to type?

And they are also leaving behind \$150 when they leave his office. Does that make sense to you?

As you sit there, that you know there wasn't anything wrong going on here, that these people are traveling these distances to this man's office, paying him \$150, a loan application is typed up, and they are sent to a specific bank? Some of themwere sent first to Manufacturers Hanover. They they come back again to Mr. Nisnewitz's office. He types it up again, or his wife types it up again, and they are sent to Mr. Ramos down at First National City Bank.

Does that make sense? Particularly when Mr. Nisnewitz tells you that he, if you believe him, that he has got all these branches very close to his office,

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he's got a First National City Bank there. He's got a Manufacturers Hanover Trust. He runs out and gets the applications every time these people come in or he sends them out for them.

Does that make sense?

This starts with the telephone call from La Morte saying to Ramos "Nisnewitz is going to send up people" and he sure does. Who does he send? He sends Natalie Prenclau. Natalic Prenclau says she's not employed by the Salvation Army and she told Mr. Nisnewitz that; on the first occasion.

He said, "Well, go find somebody if you can, a friend, to verify employment."

She leaves, and she finds a friend to verify her employment, Joey Crispel, the Salvation Army. She comes back, gives Nisnewitz that information, put it in the bank application.

Meantime she's paid him a hundred dollars for his advice not to go into Dare To Be Great. That is what the hundred dollars is for said Mr. Nisnewitz and he sends her to the First National City Bank.

Now at this point, before she goes to the bank Mr. Ramos testified he received a call from Mr. La Morte saying that Natalie Prenclau is coming in. Was that

what Mr. Ramos testified? Natalie Prenclau is coldinto the bank. And he tells Ramos that he knows Natalie Prenclau and that Natalie Prenclau had a loan at National Bank of North America. Natalie Prenclau said she never met Mr. La Morte. Who is lying? You may find that it was Mr. La Morte who was lying to Mr. Ramos; that Mr. La Morte was lying when he said he knew Natalie Prenclau.

She said she never met him. That it was Mr. La Morte lying when he said that she had a loan with his branch
or with the National Bank of North America. Mr. Drescher
said if there was a loan application to the National
Bank of North America by Natalie Prenclau you can bet the
government would walk in here with it.

Well, we would sure try and we didn't, becuase there wasn't any loan to the National Bank of North America.

But Mr. La Morte told Ramos that. You may find that that's a false statement made by Mr. La Morte -
(Mr. Friedman arose.)

THE COURT: On this record there is no evidence of any such loan.

MR. FRIEDMAN: Yes, your Honor, , nor is there any testimony from Mr. La Morte. I mean --

THE COURT: I don't recall the testimony on that subject but I do know that there is no showing on this

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record of any such loan application.

MS. HYNES: I agree with that. That is my point.

THE COURT: That is all one can say.

One cannot say as a fact it existed or didn't exist. Just on this record there is no proof of that.

MR.FRIEDMAN: I don't think the jury should be told that Mr. La Morte said this. The jury should be told Ramos said La Morte said that.

MS. HYNES: When I mention that conversation, I am mentioning it because Ramos testified to it on the stand.

Ramos testified that Mr. La Morte called him, said he was sending in Natalie Prenclau and that La Morte told him that he knew Natalie Prenclau and that she had a loan with his bank, and that she was good for this loan.

Natalie Prenclau comes into the bank after Ramos is told that she is going to come in, gives the application in, can only give social secuirty as identification, and leaves.

We had testimony by Mr. Ramos that he couldn't verify income; and that they couldn't get any more identification. There's testimony by Mr. Ramos that Mr. La Morte called him a couple of times with respect to this loan application. Called him at the bank.

And he called him at home. Called him at the bank and he said "Well, what's happening" and Ramos

testified that he told La Morte "Well, I can't get princome and I can't get any further identification".

This is told by one banker to another banker.

La Morte's response, Mr. Ramos testified that Mr. La Morte told him , "Oh, don't worry. I know her. She's good for the loan. Or words to that effect.

And that "She's had a loan at my bank."

Well, you may find that that is not a true statement by Mr. La Morte to Mr. Ramos but why would he lie
if it's not a true statement? If you find that it is not
a true statement, why? What is his interest in seeing that
Natalie Prenclau gets a loan from the First National City
Bank? Why is he so interested? Why is he calling Ramos
at the office? Why is he calling Ramos at home?

Finally he says to Ramos "What are you hesitating for? There is some money in it for you."

And Ramos testifies that shortly after that he approves the loan. She comes in, gives her a thousand dollars, and she leaves. Why is it important to La Morte that this loan go through? This is the help that came through Nisnewitz. This is the loan that has the false information, and this is the loan where there is testimony that a \$50 money order was made out to La Morte.

La Morte is a participant. He is the link between

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La Morte is involved in this. They are not going through his bank. What do you think about that? You may think that's pretty clever on Mr. La Morte's part. He's got a distant relative to put the false loan applications through First National City Bank. He is still getting money for it.

Ramos and Nisnewitz, he is the one that is calling and check

ing up and seeing what's happening to these loan appli-

Let me be quite clear. If there wasn't a red cent in this for Mr. La Morte, it wouldn't make any difference. If he participated in this agreement with Mr. Ramos and Mr. Nisnewitz to submit false loan applications, whetherhe got paid a lot of money, a little money, or no money, doesn't make any difference. It so happens that there's been evidence before you that he did get paid which you may takeinto consideration when you consider whether he was a participant in this whole scheme.

The other thing that is interesting about the loan from Natalie Prenclau is that there has been testimony at this trial that Nisnewitz was telling loan applicants "Listen, if you have to go through First National City Bank, there's going to be another 5 per cent in addition to his fee of \$150.

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When Natalie Prenclau got the loan from First National City Bank, and it was for a thousand dollars, isn't it interesting that the money order is for \$50. That 5 per cent of a thousand dollars.

Ladies and gentlemen, conspiracies don't come into being with formal agreements. You have to put all of the pieces of evidence together, and all of the pieces of evidence slowly begin to form. The first contact La Morte to Ramos. Then he calls, La Morte calls Prenclau's coming in. La Morte makes continuing calls, how's the loan doing? "I know her. She's good. You should grant it. Don't hesitate."

And then a \$50 money order made out to La Morte.

For what? I mean why all of this participation by La Morte? No knowledge. Mr. Drescher makes a big point of knowledge. Well, Miss Prenclau testified she never met La Morte. What is La Morte doing if you believe Ramos, what is La Morte doing saying he knows her? Isn't he pushing thatloan? Isn't it important to him because the only time he is going to get any money is if a loan goes through.

Mr. Nisnewitz was very clear in telling the people only if the loan goes through, then you have to pay 5 per cent of the proceeds..

And there is clear evidence in this case that the loan went through with Natalie Prenclau, there was a \$50 money order which was 5 per cent of the proceeds, and it was La Morte's name on that money order.

Now, you can say La, De, anything you want to say. It is a French sounding name. When she was asked is it La Morte she remembered it. 'She was quite truthful here on the stand saying that she had difficulty remembering it at the time.

And then you also have the further testimony of Mr. Ramos on his corroborating that there was talk of a money order but he says it was a \$15 money order and there again you may find that it was in Mr. La Morte's interest to tell Ramos he only got \$15.

Now, there is further evidence in this case about La Morte. Get to Gustavo Ramirez. Gustavo Ramirez gets on the stand and he had a very good memory of dates and what happened.

Mr. Friedman would say well, if he is off a day or two that blows the government's case. You may find that he had a better memory than average about it but maybe he was off a few days. The important thing is not what day he went into he bank. Because Mr. Ramos doesn't deny that he saw him, and Mr. Ramos doesn't deny that he

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took his loan application, and Mr. Ramos' initials are on Gustavo V. Ramirez' loan application.

So what difference if it took place on February
9th or 10th? Ramos was there. There is no question about
it.

Now Ramos testified that he received a call from Mr. Nisnewitz with respect to Gustavo Ramirez coming into the bank. Before Gustavo Ramirez came in to see Ramos, Ramos testified he'd gotten a call from Nisnewitz, and that Nisnewitz had given him the loan application and he'd also given him a W-2 statement to give to Mr. Ramos -- ycs, for Ramirez to give to Ramos.

Then we get to the crucial point when the loan is being paid out. Ramirez is getting his loan for \$1400; and Ramos says to him "How do you want it?"

He says "Cash," and then this is what Mr. Drescher says the case rises and falls on, the conversation then took place. And again this is your recollection that controls. If I say something that doesn't jibe with how you remember it, it is you. I am only trying to give you what my best recollection is of the testimony that I heard here. Ramos testified that Mr. Ramirez said "How much, 60, 70?"

And Ramos said "70" and Mr. Drescher brings out that

Ramos said he was surprised. Your recollection controls.

My recollection was that Ramos said he was surprised that Mr. Ramirez was then going to start paying him right in front of -- right in the bank in front of everybody. He gave him an envelope and he told him to meet him outside, and that Mr. Ramirez took that envelope, put the \$70 in it and gave it to him between the stairs, upstairs, downstairs. I mean that's another big inconsistency, right? Who cars whether it was on the staircase or out the front door? I mean is that what's crucial? The crucial point is that \$70 was stuffed into an envelope and given to Ramos. That's what's crucial and you have got to keep your eye on the ball and not get lost whether it was on the steps or out the door because that's not important in the case. That's just a smoke screen to get your attention off what's really going on here.

So Ramos testifies he's surprised that Ramirez is giving it to him in the bank.

Put yourself in that position. You are sitting there. Somebody is going to give you a payoff, there's been testimony there's a desk in front of him, there's a desk behind him, there are people all around. You are paying over loan proceeds and you want somebody to start peeling off \$70 in front of your co-workers? That's why

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the envelope was given to him. He was surprised at how Ramirez was paying him; not that he was getting a payment particularly.

We come to the point where Ramirez testifies
that while he is sitting there he remembers that Ramos
picked up the phone, and made a call; and that he remembers
the name Thomas. Doesn't remember the last name.

I mean if he was really trying to help the government, if
the government was really trying to get him to perjure
himself don't you think we would have him prepared to say
Thomas La Morte.

He is just telling us what he remembered as best he could remember. He remembered Thomas. And he remembered that telephone call.

Why would he lie about that? Ramos doesn't deny that call took place then. He said it could have taken place then or later but he doesn't deny it took place then.

The point is there was a telephone call to

Mr. La Morte. Well, why are you calling Mr. La Morte?

I mean La Morte's not in this case, right? I mean, why

make a telephone call to Mr. La Morte?

The why is that Mr. La Morte is in this case, that's the link, that's one of the bankers.

Okay, he is not the banker up front actually

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 taking the loan application. He may be a little bit smarter. He is more behind the scene but he is there. And there is evidence in this case that he is there. Why did he just call up Thomas La Morte and say "I got \$70"

Now again it's your recollection as to what Mr. La Morte said to Ramos, as Mr. Ramos testified.

My recollection of that testimony, and yours controls, and not Mr. Drescher's either, as he freely admits, was that La Morte said to Ramos "He shouldn't have given it to you there" or words to that effect. The point was that La Morte was surprised that Ramirez was peeling it off in the bank too but he said "That's okay, I will meet you after work and we'll split it."

Well, what about that? If Mr. Morte isn't in this case, why is this payment being made? And again, the point is not, and Mr. Drescher is correct on this, this is not a violation of the statute of about payoffs, but the payoff is important because it does show evidence that Mr. La Morte was involved in this, he had a financial interest in the outcome of it, and there's also evidence that this loan again came through Mr. Nisnewitz, who, is Mr. La Morte's buddy.

And that there was false information in this loan.

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MR. DRESCHER: May I say, your Honor, I must object. I hate to interrupt but there is no testimony that they were buddies. They met once at the bank and

that was brought out in cross examination through --

Why are they only getting --

MS. HYNES: I didn't hear the objection.

MR. DRESCHER: You said they were buddies. I am sorry if I didn't hear you.

THE COURT: I guess I understood her to say that too. I do not regard that as exceeding the bounds of argument, so go ahead.

MS. HYNES: All right, I withdraw buddies.

They knew one another. Mr. Drescher made the point that

Mr. Nisnewitz wanted to be friends with Mr. La Morte.

He was a banker.

Now the defendants Nisnewitz and La Morte are charged not only with conspiracy but with aiding and abetting; and if they were aiding and abetting in submitting false loan applications, and if you find that the evidence shows that they were aiding and abetting, in submitting these false loan applications, then they have violated the law. It is not necessary that Mr. La Morte walk into the bank with the false loan application and the judgewill charge you on that. If he has a part in it, and aids and

abets, and causes that false loan application to be submitted to the bank, that is a violation of the law.

Now we come to Mr. La Ferla. Mr. La Ferla comes from Suffolk County, comes all the way into Queens to have Mr. Nisniewitz fill out a loan application. There are two loan applications that he says Mr. Nisnewitz made out for him. Let's deal with the loan application to First National City Bank. He says that he gets a loan application for First National City Bank from Mr. Nisnewitz typed up by Mrs. Nisnewitz, and he is again being sent to see Mr. Ramos.

He goes to the bank and Ramos isn't there.

He asks for Ramos, he is not there. So he walks out and he calls Nisnewitz: If there is nothing wrong with these loan applications, why is he going back and checking with Nisnewitz if Ramos isn't there? So he calls Nisnewitz and the testimony was I think that Ramos was on jury duty, whether that came from Mr. Nisnewitz, I don't recall.

So Nisnewitz says to him we will go back and give itto a Mr. Scully. And the loan application for Roger La F erla has the name Scully on it; and the date; which is not the same date it was typed.

So in the loan application for Roger La Ferla we

don't have Mr. Ramos in that one. Who do we have in it?
Mr. La Morte. We had testimony La Ferla is the gentleman
who went to see Mr. Nisnewitz with Mr. and Mrs. Walther;
and they were some of the last witnesses to testify in
the government's case.

They went to see Mr. Nisnewitz, Mr. and Mrs. Walther were both present during the conversation, both testified about the \$150 fee for the loan application, and that there was an additional 5 per cent charge if it went through First National City Bank.

They also testified to something else. They testified, and specifically Mrs. Walther testified that she received a call from Mrs. Nisnewitz and that Mrs. Nisnewitz gave her the name La Morte and the telephone number and told her to call him, and Mrs. Walther testified she gave that information to Roger La Ferla. and that Roger La Ferla, he testified, that he called, he dialed that number, the man on the other end of the phone. identified himself as La Morte. Well, what's La Morte doing in this one too? Here Ramos is on jury duty; and La Morte's name comes up. Maybe because Ramos isn't around. But there is Mrs. Walther, what reason does she have to lie about the name La Morte? Really, what reason does she have? Unless you are going to believe the

how the government prepared this case. She came up, she is an important witness, and said "I got the name La Morte. I gave it to Roger," and then Roger says he called La Morte. Strange for somebody who doesn't have anything to do with this case. Also strange that the loan application came through Mr. Nisnewitz, more strange that there is false information in that loan application.

This is the one that deals with Mr. Nisnewitz' next door neighbor, Joanna Graphics, which is put down as Roger La Ferla's place of employment and all of a sudden Mrs. Nisnewitz is telling Mrs. Walther to call La Morte about this loan.

MR. DRESCHER: To find out if it was granted.

MS. HYNES: Ladies and gentlemen, I submit to you that if you think about all of the evidence in this case, and if you weigh it carefully, and weigh the evidence that concerns Mr. La Morte, that you will find that Mr. La Morte was a member of this conspiracy, that he did have knowledge about what was going on, and that he did participate. The jury will charge you that in the conspiracy, not every co-conspirator has to play an equal role. That isn't always the way it works. And not every co-conspirator has to know every single element or fact

of that conspiracy. Listen to the law very carefully when the judge charges you on what the government must prove for a conspiracy, and I submit to you that on the evidence in this case, Mr. La Morte was a member of this conspiracy. That he was operating with Harold Nisnewitz and with Jose Ramos, to submit false loan applications.

Now let me just touch briefly on these loan applications. Let me just make one point before I go to that. Mr. Drescher at the end said he wouldn't deny that Mr. La Morte got the money. Mr. La Morte denied it in the grand jury. But Mr. Drescher said maybe La Morte even lied in the grand jury but he was doing it to save his job.

Well, the fact is that, you may find out on the evidence here, that La Morte did lie in the grand jury, and that he lied in the grand jury for more reasons than just to save his job.

That he lied in the grand jury to cover up what the real facts were in this case.

Mr. Friedman has told you that what is really going on here is that these people were just going to Mr. Nisnewitz to findout what to do about a loan application. Mr. Nisnewitz didn't have any knowledge about it. Well, what was going on?

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Mr. Nisnewitz, he testified, he said these people came to him through Dare To Be Great or Koscot. They were referred to him. This is a red herring. The government isn't proving a case here against Koscot or Dare To Be Great. That's simply a common thread of how people got to Harold Nisnewitz.

If they weren't trying to invest in Koscot or
Dare To Be Great but there were still false loan
applications being submitted, we'd still be here arguing
to it. That is in the crucial part of the government's
case. It is part of it because it is part of the common
scheme of what was going on.

And Mr. Nisnewitz testified, these people got to him through people in Dare To Be Great or Koscot.

If you were to believe Mr. Nisnewitz, the first thing he does is try to discourage these people from going into Koscot or Dare To Be Great. Let's think, common sense, right?

Mr. Nisnewitz testifies he is going to charge these people this fee for future accounting services.

These are future clients of his, right? Future clients if they go into Koscot and Dare To Be Great; he's got a client there. They want their books and records kept. They want their tax returns done. He is in business. He

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wants more clients. That is not his testimony, first thing he does is say, "Oh, don't go into this business."

I mean if you believe it. Isn't that against his financial interest? Do you really think that that was what was going on here? This is an accountant. He wants business.

He wants clients. He wants to make money. But he says the first thing he does is tell these people, "Dont go into it," I don't think much of the program."

These are people who are coming to him through that program. Does that make sense to you? I mean does that strike you as a truthful statement? And thatthese people, yes, they were not named as defendants, they were named as co-conspirators, they all testified that they knew what was going on. They were victims as much as anything. Here they were all in a particular circumstance where money ment a lot to them. Some were unemployed. Miss Prenclau, her marriage had broken up. And they all find their way to Mr. Nisnewitz; and they were all hurting for money. That is certainly something that they have in common. They are all hurting for money. And yet they are willing to turn over a hundred or \$150 to Mr. Nisnewitz for future accounting services if they happen to get into a program that the reason why they are there is because they don't have the money to invest in it?

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I mean, think about that. Does that make sense to you? If you were going to an accountant and you wanted to invest in a company and was going to cost you money, which you didn't have, would you start plunking down \$150 for future accounting services?

MR. FRIEDMAN: I don't want to interrupt, Miss

Hynes, but there is no testimony that these people did not

have money. They testified as to their --

THE COURT: Their financial circumstances.

MR. FRIEDMAN: Financial circumstances.

THE COURT: I think this is argument that is within the scope of propriety and I will permit it.

MS. HYNES: Okay, Johnny Rodriguez was on welfare.

Roger La Ferla was unemployed. Gustavo Ramirez

was employed but didn't have the money. And they were

all there to get a loan. And they all kept coming back
in connection with loan applications. And the other

interesting fact that was brought out was Gustavo Ramirez

got the loan, went into Dare To Be Great.

Mr. Nisnewitz, if you believe him, testifies he never knew he got the loan, he never knew he went into Dare To Be Great. What was he collecting that \$150 for? He says he never set up his books, never did his tax returns, but he did make out two loan applications for him, didn't he?

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And with Gustavo Ramirez' application came in the W-2. Gustavo Ramirez testified that Mrs. Nisnewitz typed up a W-2. Now why again is he lying unless you are going to believe Mr. Drescher that he is lying because the government put him up to it? What is his reason for lying? He got on the stand as all these witnesses got on the stand and said no promises were made to him.by the government.

That was what that \$150 was for.

And he 's also testifying here and in the grand jury that the W-2 statement was prepared by Mr. Nisnewitz in his office by his wife typed up. He testified he made about \$8,000. Mr. Nisnewitz' gave him a W-2 for\$10,500 or thereabouts. And then he was asked on cross examination how many copies and he said four. Again that is your recollection. He said he thinks that they gave him the four copies.

Mr. Nisnewitz when he testified said when a W-2 comes in it has eight copies but then he proceeds to tell you that four copies are -- they are two separate packets of four copies each. It could very well be that there were four copies that Mr. Ramirez was given but there again, are we really talking about four copies or one copy? We are talking about whether the W-2 form

was prepared in Mr. Nisnewitz' office, and was submitted to the bank, and was a false statement about income. Ramirez says it was prepared by Mrs. Nisnewitz, and that it did not reflect his income. Mr. Ramos testifies that he saw a W-2, and you don't have to take his word for it because he made a notation on the loan application. That is Government's Exhibit 4 and just let me mention that there are six loan applications in evidence, Counts 1 through 6 and they are all numbered 1 through 6, if you want to see them.

Remember Mr. Ramos testified that that was his handwriting? I don't know whether you can see with the light but it says W-2 1971, total wages \$10,500. Ramos testifies that he made that notation when he received that in the bank.

Everybody is lying, Mr. Nisnewitz is telling the truth? That is what you are going to have to believe.

Was Mr. Nisnewitz a believable witness to you? Did he remember important events? Did his testimony make sense to you based upon everything else that you heard in this case?

Did he change his testimony when he was on the stand?

You have to consider credibility of witnesses. That is one of your most important functions. And you have to consider the credibility of Mr. Nisnewitz. Does it make

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sense that these people were giving him \$150 and coming great distances for him to type up these loan applications?

Does that make sense to you? Do you believe his testimony? That is what you have to make up your mind.about.

Because Mr. Ramirez says that he was given a phony W-2, Mr. Nisnewitz says no. You have to decide whether you believe Mr. Nisnewitz or Mr. Ramirez. You have evidence here that a W-2 containing total wages of \$10,500 was given to Mr. Ramos. Think of another situation.

Why would Mr. Ramirez get a blank W-2 to fill out himself? Where is he getting that? He says he makes \$8,000. He is a kid, 20, 23. Works for Cadillac Motors.

Isn't it more believable -- he makes \$8,000?

Then you have other income in here of \$3500; and then you also have date of birth that is wrong. And Mr. Ramos testified "I didn't see a birth certificate." He testified there that he didn't see a birth certificate. He did lie about it at the grand jury but he pled guilty and he testified for the government and he testified, you mayfind, truthfully, and he said in response to a question that's what he was told to do, to tell the truth; and when you are weighing Mr. Ramos' testimony, I urge you very strongly to remember that he is testifying in front of a judge that is going to sentence him, and ask

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yourselves if it makes sense for him to start telling 3 lies.

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The applications, two of them for Johnny Rodriguez. Mr. Nisnewitz testified that Johnny Rodriguez came to see him and he was with Willie Colon and Bennie Martinez, I think the name was. And Mr. Rodriguez testified that he went to see Mr. Nisnewitz and those two people were with him. Mr. Nisnewitz has testified in this trial he had no blank loan applications in his office. And every time one of these people came he'd send them to a local branch of the bank, or he'd go, a five-minute drive, or he'd send these people out, on each time he'd do this.

And he testified that he had no knowledge that Johnny Rodriguez didn't work at Willie Colon's body shop, if there is such a body shop.

Johnny Rodriguez testified that he walked into Mr. Nisnewitz' office and he told Mr. Nisnewitz "I'm unemployed, I am on welfare," and Mr. Nisnewitz said "Well, is there anybody that can verify employment for you?"

Do those facts sound familiar to you? Isn't that the same story that Roger La Ferla told? Isn't that the same story that Mrs. Walther told? Isn't that the same story that Mr. Walther told? I mean, what makes sense? Are those four individuals lying and Mr. Nisnewitz is telling the

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truth? What do you think?

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There is a pattern of testimony here where these people came in to Mr. Nisnewitz' office, they were asked "Well, who can verify employment for you? Can you get anybody to verify employment?" Natalie Prenclau told you the same thing. You have to disbelieve all of those witnesses and believe Harold Nisnewitz; if you believe that Johnny Rodriguez didn't tell that.

So there is a loan application made out to Manufacturers Hanover Trust. You saw Johnny Rodriguez on the stand. Annual salary put in there of \$16,000. Other income \$4,000. Typed up by Mrs. Nisnewitz and he gets sent off to Manufacturers Hanover Trust. Loan is declined. He again comes back to Mr. Nisnewitz. Mr. Nisnewitz fills out another application, First National City Bank. This time the salary is hiked up. Johnny is trying to get a \$5,000 loan. This time the salary is put in \$20,000, and \$4,000 additional income; and the same application of employment, Willie Colon's Body Shop.

Johnny Rodriguez testified that when he came to see Mr. Nisnewitz he was with Willie Colon; Nisnewitz says he was; and that Willie Colon joined in the conversation at some point and they decided that they would put Johnny's place of employment as Willie Colon's Body .

Shop. And that's how that happened.

Isn't that more believable? I mean if you are going to believe Mr. Friedman when he says that Johnny Rodriguez was driving down to Mr. Nisnewitz' office in the car with Willie and Bennie, and this was all figured out before time, well, why are they then continuing all the way out from the Bronx to Ozone Park, Queens, to have somebody type in that loan application information that they could have filled in in their own living room?

Why?

Because that's not how it hpapened. How it happened is the way Johnny Rodriguez told you on that stand.

That was all cooked up in Harold Nisnewitz' office.

It wasn't cooked up in the car. If it was cooked up in the car they could have turned around at the next red light and went home. The business was done. They figured out how to do it. That is not how it happened. The more credible and believable way of how it happened is how John Rodriguez told you it happened.

And he paid Harold Nisnewitz \$150, and that was the reason. Harold Nisnewitz was giving more than advice about going into business. Harold Nisnewitz was giving advice about how to get a loan.

Now we come to Roger La Ferla. And here

Mr. Nisnewitz would have you believe that Roger La Ferla came in from Patchogue, Long Island, to see him in Ozone Park, Queens, and walked into his office and says, "I am employed by the guy next door; Joanna Graphics. Mr. Nisnewitz at first said he just puts it down on the loan application. This is also the man who was the accountant for some period of time for Joanna Graphics. He works right next door to Joanna Graphics. I mean is it believable if Roger La Ferla is coming all the way in from Patchogue to have this loan application typed out, by Mr. Nisnewitz, and he decides whaton the way in the door, that he's going to use the guy next door as his place of employment? Is that believable to you? That's where you have to make up your mind what's believable.

Or is the testimony of Roger La Ferla more believable? He says he walks in, and there's corroboration by Mr. and Mrs. Walther in this. They were present.

And he says to Nisnewitz, "I am not employed."

Nisnewitz gives him the same spiel. "Well, is there anybody who can verify your employment, any friends?"

And Roger La Ferla says, "No, I don't."

So Nisnewitz says "Don't worry, I will use one of my clients, Joanna Graphics, the guy next door."

Now, what's more believable? Where you think

that idea came from? Isn't it more believable when three people got on that stand and told that story under oath, or are you going to believe Harold Nisnewitz, not only did he not know it, he never had a conversation with the guy who owned Joanna Graphics and said, "You know, this guy is using your place as a place of employment"? Is that believable to you? You have to use your common sense here. Doesn't it make more sense to believe Roger La Ferla, Bob Walter, that this idea came from Harold Nisnewitz? And that they paid Harold Nisnewitz \$150? What were they paying that \$150 for? They went went into Koscot or Dare To Be Great. They never got the loan.

Ladies and gentlemen, it is late, I am sure there are arguments that I have left out that I should have brought to your attention. But I know that you have listened to all of the testimony here and you are going to use your good common sense in deciding who is telling the truth.

I again stress to you that under the oath that
you took when you sat in this jury box and first started
to hear the testimony, your decision has to be on the facts,
and you have to decide facts. It cannot be decided on
the basis of sympathy but only on the facts. You are
not to consider the punishment here, that is not your

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function. That is the judge's function.

Your function is to decide the facts.

We submit to you on the basis of the evidence that's been presented to you, and don't hesitate to ask for any of these loan applications so you can see and examine them yourselves, but on the basis of the evidence that's been presented to you in this trial, that the defendant Harold Nisnewitz is guilty of Counts 1 through 6 of making false statements on loan applications, and that on Count 7, that the defendants Harold Nisnewitz and Thomas La Morte together with Jose Ramos who has already pled guilty, did conspire and did agree as the judge will charge you when you listen to his charge on the law, and you will find, I am sure, that the government has proved what it's been required to prove, that there was a conspiracy here to submit false loan applications, and that you cannot shrink from your duty as jurors to find those facts. I thank you very much for your attention, and for your indulgence in the late hour.

Thank you.

THE COURT: Now, I am going to charge, ladies and gentlemen on the law at 10 o'clock in the morning, because it is late and I have a charge of some length because this is a case of some length.

Therefore would you all please be here promptly so that we can commence at 10 in the morning and I will charge you at that time.

Overnight you are not to speak about this case amongst each other or with anyone else and you are to continue to keep an open mind that I trust you have been keeping through the entire trial as I have instructed you.

Good night. I will see you in the morning.

(Adjourned to Wednesday, May 10, 1974,
at 10:00 o'clock a.m.)

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UNITED STATES OF AMERICA

HAROLD NISNEWITZ and THOMAS LA MORTE.

74 Cr. 96

May 9, 1974 10:00 a.m.

(Trial resumed.)

(In the robing room.)

THE COURT: Mr. Friedman, you had something you wanted to make a matter of record?

MR. FRIEDMAN: Yes, your Honor, I wanted to object to certain statements during the closing statement of the government.

Number one is to the reference to the importance of the government's case.

I am going to object to that statement.

I am also going to object to the statements concerning Ramos' plea of guilty to conspiracy, and with Mr. Nisnewitz and Mr. LaMorte, and any inferences that may have been drawn or any statements which may have been said about that.

I feel that not only that Mr. Nisnewitz and Mr. Scully have been impugned, but I think that we were denied our right to confrontation.

I'd like the record to reflect that I am objecting to it.

THE COURT: All right.

Let me say this. I am going to charge that this case is important to both the government and the defendants.

Your second objection was--

MR. FRIEDMAN: Any statements regarding Ramos' plea of guilty and how that plea--

THE COURT: I am going to emphasize very strongly the charge that I read to you yesterday on that score.

MR. FRIEDMAN: I understand that.

THE COURT: Now with regard to the statements of who said what, I believe there was one statement that my notes showed was erroneous in the government's summation, which was that Mr. LaMorte had called Ramos on a particular occasion saying Mrs. Prenclau was okay, he had done business, and my notes show it was Mr. Nisnewitz. At least, that is what my notes reveal to me.

MS. HYNES: That is not the testimony.

THE COURT: In any event, whether I am right or

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MS. HYNES: That is not the testimony.

THE COURT: In any event, whether I am right or

whether I am not right, I am going to charge the jury, and I have already framed the charge, that there was a great deal of dispute here as to what the testimony in fact was, and that while it is their recollection that governs, I am going to charge them in substance that they must be confident in that recollection and that if there is any question in their minds as to that recollection, they may call upon the testimony to be read to them, addressing myself to that very question that you raise, because there was a great deal of objection and controversy over that in both summations yesterday, and so I want to make sure that the jury knows that they may have any read to them that they wish, and that they must be confident in their recollection.

MR. LAWYER: Your Honor, can't we simply ask that that be the normal charge?

THE COURT: No, I am not going to because there was a lot of that here and Ms. Hynes at one point said that she withdrew a statement of fact that she had earlier made, and I just want the jury to feel that—I want them to be unequivocally clear that if they want to hear testimony, they may hear it.

MR. LAWYER: That is all we are asking. We are asking that it not be highlighted in the sense that --

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THE COURT: No, there has been a lot, and I feel that --

MR. FRIEDMAN: I think that the statement made was that LaMorte said, and I think that--

MS. HYNES: That was corrected immediately.

THE COURT: My notes, as I say, showed that when there was a question about Mrs. Prenclau's prior relationship with anybody, that it was Mr. Nisnewitz who said he had a prior dealing with her and I recall you saying--

MS. HYNES: He did. That was the testimony, and thereafter, after the application was in, Ramos testified that he received phone calls from LaMorte, so that's two different --

THE COURT: I am not going to address myself to any specific conversation, lady and gentlemen here, because I feel that is inappropriate, but I am going to urge the jury that they must in this case be absolutely confident in their own recollection and that if it is of aid to their recollection, that they may have the minutes read to them wherever they deem it helpful in their deliberations.

I am going to, on the question of the guilty plea, I am going to emphasize the Wood instruction that I spoke to you about yesterday.

MR. FRIEDMAN:

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THE COURT: And I trust that the jury will hear

Yes, sir.

and appreciate the law as I give it to them in that regard.

As far as Mr. Ramos' jury duty, I note your objection, Mr. Friedman.

I do think that i f you had had a question with regard to any issue there, you could have called upon me to have Mr. Ramos recalled as your witness; so that I do not feel that there is error there upon anybody's part, and . so I will just let the record show your objection.

I do not feel that it is one that needs comment by the Court in any charge, nor do I feel it is necessarily well-founded, but in any event, you made your record.

MR. FRIEDMAN: As I understand it, if I were to request such a charge then, your Honor would deny my request?

THE COURT: I don't know what the charge is. MR. FRIEDMAN: I would request that your Honor charge that Ramos, when he was on the stand, the govern-

ment did not put the question to him, did not lay the foundation for LaFerla's subsequent testimony.

THE COURT: Yes, I would decline to make that I think that eliciting of testimony in this regard is in your competent hands as counsel, and if you

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wanted him back for that issue, you had only to make application to me, and I would have seen to it that he was made available to you.

In any event, why don't we get the jury and go forward.

(In open court, jury not present.)

THE COURT: Ladies and gentlemen, we are missing one juror. It is 20 past ten and I am of a mind to substitute an alternate and charge.

Is there any objection to that procedure?

MR. DRESCHER: Which juror?

THE COURT: Juror No. 7.

MR. LAWYER: Your Honor, we would only ask that we wait until 10:30 if the Court has a mind to do that.

THE COURT: For what reason?

THE CLERK: It is No. 3, No. 3 is missing, not No. 7.

THE COURT: Excuse me, the Clerk corrects me.

Mr. Dorsa says it is No. 3.

MR.DRESCHER: No. 3?

THE COURT: Yes, in the front row.

MS. HYNES: Your Honor, while the jury is not here, the government -- this may be included in your Honor's charge, it is just that I am not certain, and I have not

questioned the Court -- but with respect to the substantive counts 1 through 6, there are several false statements alleged in many of these counts; employment, income, purpose, and we would ask the Court to charge that if they find that one of those statements is false, that is sufficient under the statute.

THE COURT: Under that count?

MS. HYNES: Yes, under that count.

THE COURT: I will so charge.

MR. FRIEDMAN: I would ask your Honor that my understanding of 1014, your Honor, would first have to find materiality. That would be a question of law of the false statement.

THE COURT: No, I am going to charge them that as a matter of law, matters having to do with income, employment, purpose and age, are material.

MR. FRIEDMAN: I don't think the government offered any proof as to purpose and age as bein material.

We would concede that employment and income is material, but we say that that question is a question of law, for the Court. There has been no evidence of the materiality of those two.

MS. HYNES: It is a question of law and the Court can make the determination that that is material; age or

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY : "MARE NEW YORK, N.Y. CO 7-4580

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purpose is material.

THE COURT: Mr. Friedman, wouldn't you acknowledge that if the man came and said, "My purpose is to purchase heroin with this money," that the banker might consider that as bearing upon the appropriateness of the loan?

MR. FRIEDMAN: I was prepared, your Honor; if
the government was going to produce a witness as to materiality of the purpose of the loan, to bring in a banker
who would testify that the purpose of the loan is never
considered by the bank; it is only kept as a matter of
record, but it is not up to me to do anything. It is up
to the government to prove that the purpose of the loan,
as well as the age of the applicant, is material, and
there has been absolutely no evidence.

MS. HYNES: Your Honor, let me just address myself first to the purpose.

If the purpose of the loan was to invest in a company, and you had testimony from Mr. Nisnewitz in the grand jury that he had advised these people not to quit their job; in other words, if they are going into business and the bank knows they are going into a business that may be risky and they may quit their jobs and have no other income, at that point thepurpose of a loan becomes very

relevant because if the loan can't be paid back because they have quit a job, that is certainly a situation where the bank is going to look closely at the purpose.

As far as the age, if someone goes in who is under age and applies for a loan and gives false proof of age, there is a problem. You also have a problem of legality of contract, I would assume, with people who are borderline.

THE COURT: I think the only question that really you are presenting to me is whether I should charge that the purpose and the age are questions of fact as to their materiality. That was --

MS. HYNES: No.

MR. FRIEDMAN: No, I think the case law is that the judge must find the materiality. That is a question of law, and I am suggesting to your Honor that there has been no testimony as to the materiality of the purpose or the age in such an application.

I am willing to concede, of course, that the employment and income is material.

MS. HYNES: We haven't produced any evidence on that either. It just points up that that is the question for the Court to determine and we are not obligated to submit evidence on it.

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THE COURT: Mr. Friedman, I am going to charge that both of them are material and you may have an exception.

MR. FRIEDMAN: Thank you, your Honor.

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## THE CHARGE OF THE COURT

J. Owen

(In open court, jury present.)

Ladies and gentlemen of the jury, we are now at the stageof the trial where you will soon undertake your final function as jurors in this case, and as I stated to you, during the time of jury selection, you are here to perform one of the most sacred obligations of citizenship, which is to act as ministers of justice in this case in the determination of the facts.

You are to discharge this final duty of yours in an attitude of complete fairness and impartiality.—this was emphasized by me when you were selected as jurors—without bias or prejudice for or against the government or the defendants as parties to this controversy.

This case is important to the government since the enforcement of criminal laws is a matter of paramount concern to the community.

But it is equally important to these defendants who are here charged with serious crimes.

Let me add this. The fact that the government is a party entitles it to no greater consideration than that accorded any other party to this litigation. By the same token, it is entitled to no lesser consideration. All

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parties, both the government and the individual defendants here alike stand as equals, equals before you, before the bar of justice.

Your final role is to decide and pass upon the fact issues in this case. You are the sole and exclusive judges of those facts. You pass upon the weight of the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the evidence.

You draw such reasonable inferences as may be warranted from the facts as you find them from the evidence.

I shall later give you more detailed instructions on how to determine the credibility of witnesses.

Now, my final function is to instruct you as to the law, and it is your duty, ladies and gentlemen, to accept these instructions on the law and to apply them to the facts as you may find them.

With respect to any fact matter, it is your recollection and yours alone that governs. As I have already told you, anything that counsel, either for the government or for any defendant may have said with respect to matters in evidence, whether during the trial, in a question, in an argument, or in the summation, is not to be substituted for your own recollection of the evidence.

So, too, anything that I may have said during the trial or my referral to during the course of these instructions as to any matter of evidence, is not to be taken in place of your own recollection.

I wish to add, there has been dispute in summations as to the testimony in various critical particulars. Thus, it is important to your deliberations that you, whose recollection governs, be confident in that recollection.

Therefore, I instruct you that if you find it helpful to your deliberations, you may have testimony read to you and, of course, you may have in the jury room any exhibit marked in evidence.

Before we considee the precise charges against the defendants on trial, some preliminary matters should be noted.

The indictment returned by the grand jury in this case, which I am holding up, charges that the two defendants on trial before you were engaged in a conspiracy which, it is claimed, included other members; Mr. Ramos, Miss Prenclau, Mr. LaFerla, Mr. Ramirez, Mr. Rodriguez, and others known and unknown to the grand jury.

However, except for Mr. Ramos, the others that I have named were not indicted and named as defendants, but they were only named as co-conspirators.

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The fact that the grand jury named these persons as co-conspirators, or in the case of Mr. Ramos, as a defendant, but as co-conspirators, did not indict them defendants, is not to enter into your consideration or play any part in your deliberations except insofar as it may bear upon the credibility of any of them, as to which I shall hereafter instruct you.

I say to you in this case that guilt is personal. The guilt or innocence of each defendant on trial before you must be determined with respect to him alone, and solely upon the evidence presented against him, or the lack of evidence.

The charge against any individual defendant stands or falls upon the proof or the lack of proof against him, and not against any co-conspirator or co-defendant.

There are also six counts of substantive cahrges, as to which you heard in the summations and as to which I shall instruct you further later, and certain portions of what I have said are equally applicable to your determination on those, and I shall get into that in greater detail.

Now there are certain princples of law which apply to every criminal case. And I shall repeat them now.

The indictment is merely an accusation, it is a

charge. This piece of paper is no evidence or proof of a defendant's guilt, and no weight whatsoever is to be given to the fact that an indictment has been returned against the defendants.

Each has pleaded not guilty. Thus, the government has the burden of proving the charges against each defendant beyond a reasonable doubt. A defendant does not have to prove his innocence, or to prove anything. On the contrary, he is presumed to be innocent of the accusations contained in the indictment.

This presumption of innocence was in his favor at the start of this trial, it has continued in his favor throughout the entire trial, and it is in his favor even as I instruct you at this very instant. And it remains in his favor during the course of your deliberations in the jury room.

The presumption of innocence is removed only if and when you are satisfied that the government has sustained its burden of proving the guilt of a defendant beyond a reasonable doubt.

The question comes up, what is a reasonable doubt? The words almost define themselves. A reasonable doubt is where there is a doubt founded in reason, and arising out of the evidence in the case or the lack of

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after carefully weighing all the evidence. Reasonable doubt is a doubt which appeals to your reason, your judgment, your common sense, and your experience.

It is not caprice, whim, speculation, conjecture or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, ladies and gentlemen, after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of a defendant, then you do not have an abiding conviction of that defendant's guilt which amounts to a moral certainty, and in sum, if you have such a doubt as would cause you, as prudent persons, the hesitate before acting in matters of importance to yourselves, then you have a reasonable doubt, and in that circumstance, it is your duty to acquit.

If, on the other hand, after such an impartial and fair consideration of all the evidence, you can candidly and honestly say you do have an abiding conviction of a defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and under such circumstances, it is your

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duty to convict.

One final word on this subject. Proof beyond a reasonable doubt does not mean proof to a positive certainty, nor does it mean beyond all possible doubt. If that were the rule, few persons, however guilty, would be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty.

In consequence, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

With the foregoing general instructions, let us turn to the specific charges.

The indictment in its first six counts, which charge Mr. Nisnewitz alone, reads as follows:

"On or about the dates hereafter set forth, in the Southern District of New York and elsewhere, Harold Nisnewitz, the defendant, unlawfully, wilfully and knowingly did make and cause to be made, and did aid, abet, counsel, command, induce, and procure the making of false statements, reports, wilful overvaluations of property and property and security, as hereinafter set forth, in and in

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connection with loan applications submitted by persons hereafter set forth to banks hereafter set forth, the deposits of which were then insured by the Federal Deposit Insurance Company for the purpose of influencing the action of said banks to approve said loan applications.

The indictment then specifies six specific counts under column headings.

Count 1: That on or about the 6th of January of 1972, loan applicant Natalie V. Prenclau made application to the First National City Bank with an application containing the alleged false statement. Natalie Prenclau was employed by the Salvation Army.

Count 2 charges that on or about the 9th of February of 1972 Roger LaFerla was a loan applicant to the First National City Bank.

The false statement charged-- false statements charged were that Roger LaFerla was employed by Joanna Graphics at a salary of \$12,740, and earned additional income of \$3,500 as a carpenter.

The purpose of the loan was for wedding expenses.

Count 3 alleges that on or about the 24th of January, 1972, Gustavo Ramirez was a loan applicant to the Manufacturers Hanover Trust Company.

The false statements alleged that Gustavo Ramirez earned an annual salary of \$10,256 and earned additional income of \$3500 as a part-time salesman.

The purpose of the loan was for furniture and a vacation.

Gustavo Ramirez was born on March 1, 1947.

Count No.4, charges that on or about the 3rd of February, 1972, Gustavo Ramirez was the loan applicant to the First National City Bank, and the false statements alleged are that Gustavo Ramirez earned an annual salary of \$10,256 and earned additional income of \$3500 as a part-time salesmen.

The purpose of the loan was for furniture and a vacation.

Gustavo Ramirez was born on January 1, 1947.

The fifth count-- as I repeat, counts 1 through 6, only are applicable as to Mr. Nisnewitz -- count No.5 alleges that on or about the 20th of December, 1971, Johnny A. Rodriguez was the loan applicant to the Manufacturers Hanover Trust Company.

The false statements alleged were that Johnny Rodriguez was employed and earned an annual salary of \$16,640 and earned additional income of \$4,000 as a salesman.

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The purpose of the loan was to renew the apartment of Rodriguez.

Count 6 alleges that on or about the 2nd of February, 1972, Johnny Rodriguez was a loan applicant to the First National City Bank, and the false statements alleged that Johnny Rodriguez was employed and earned an annual salary of \$20,020, and earned additional income of \$4,000 as a salesman.

The purpose of the loan was to renew the apartment of Rodriguez.

Now the indictment refers to two statutes, Title 18, United States Code, Sections 1014 and Section 2, and I shall read to you at this point the pertinent part of Section 1014 from the criminal laws of the United States.

"Whoever knowingly makes a false statement for the purpose of influencing in any way the action of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, upon any application or loan, shall be guilty of a crime."

Before we consider the essential elements of this crime, which the government must establish before a conviction may be had, a brief word about the purpose or the thrust of this statute.

May I say at this point it is not necessary for

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the government to prove that the defendant Nisnewitz knew that the bank to which the loan application was submitted was insured by the Federal Deposit Insurance Company, but rather the proof need only show in that regard that the defendant knew that it was a "bank" which he intended to influence, if you so find.

Now the essence of the crime defined in that statute is the making of a false statement in an application for a loan for the purpose of influencing in any way the action of the bank from which the loan is sought.

It is not dependent upon the accomplishment of that purpose. The law is pinpointed to the application for the loan. Obviously, the bank officials who make loans cannot investigate each and every individual application.

The purpose of the statute is to allow such bank officials to accept at face value the statements made in those applications in deciding whether or not a loan should be granted.

Thus it requires that such statements which have the capacity to influence them be accurate or not knowingly false.

The statute does not require proof that the bank officials relied upon the alleged false statements. The statute has nothing to do whatsoever with defrauding the

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bank or whether or not the bank is actually defrauded.

The fact that no pecuniary losses may have been suffered is not relevant under this statute.

Since it is claimed that these loan applications involved were those of others, and that Mr. Nisnewitz did not sign any of them, the government is also relying upon Title 18, United States Code, Section 2, which states:

"A, Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

"B, Whoever wilfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States, is punishable as a principal."

Now I charge you that in order to convict, it is not necessary for the government to show that Mr.

Nisnewitz physically made a false statement or that he applied for a loan.

The law is that one who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.

To determine whether a person aided and abetted the commission of an offense, you ask yourselves these questions:

Did he associate himself with the venture?

Did he participate in it as something he wished to bring about?

Did he seek by his actions to make it succeed?

If he did, then he is an aider and abettor.

Under the law, a person may be guilty of making a false statement if he knowingly causes another to do the act, resulting in the misstatement of fact, whether the party thus actually making the misstatement of fact is a knowing participant in the falsification or simply an innocent intermediary whose misstatement is the result of ignorance, negligence, or misunderstanding rather than intention.

Now, given the foregoing, before defendant

Nisnewitz may be found guilty of any of counts 1 through 6,

charged in the indictment, you must find beyond a reason
able doubt the following essential elements as to each

count:

First, as to each count, that on or about the date charged in the indictment, in connection with a loan application to the bank by the alleged borrower, that defendant Nisnewitz did aid, abet, counsel, command, induce, and procure the making of a false statement or did unlawfully and wilfully and knowingly make or cause to be made

such false statement or statements in said loan applications.

Second, as to each of the counts, before you can convict on any count, you must find the second requirement:

That the statement or statements alleged or any of them in any count was false.

Third, that defendant Nisnewitz knowingly aided, abetted, counseled, commanded, induced or procured the making of the false statements or did unlawfully, wilfully and knowingly make and cause them to be made.

Fourth, that the false statement was made for the purpose of influencing the bank's action on the acpplication that was submitted.

I charge you that as a matter of law, statements on an application as to employment, income from that employment, the purpose of the loan, and/or the age of the applicant, are material.

The statute, as I read to you, refers to one
who "knowingly makes any false statement"; thus, before
you may find that the government has established this
element as to any count, you must be satisfied that defendant Nisnewitz, in connection with any statement, if you
do find that it was false, acted deliberately, intentionally
and understandingly; that is, that he knew what he was

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doing, that he knew the statement was false when he made it, and/or aided, abetted, counseled, commanded, induced or procured its making.

However, I charge you that one knowingly makes a false statement if you find that it is made with (1) reckless disregard of whether or not it was true, and -- and I underscore "and" -- (2) with a conscious purpose to avoid learning the truth.

On the other hand, I also charge you that the law does not punish a person who makes a false statement inadvertently or negligently.

You must decide these matters from all the evidence and the surrounding circumstances attendant upon the applications for each loan, and the procedures with respect thereto, and the reasonable inferences to be drawn therefrom.

If upon all the evidence the government has sustained its burden of proof as to the essential elements of any of country 1 through 6, your verdict should be guilty as to such count or counts.

If it has failed as to any count, your verdict must be not guilty as to that count.

Since the case has been of relatively short duration and the testimony is fresh in your mind, counsel

in their summations have reviewed the evidence on these counts, it would be needlessly repetitious for me to summarize the testimony of the witnesses in detail as to these counts and I shall not do it.

Now, turning to count 7.

As to count 7, the substantive counts that I have earlier charged you as to Sections 1014 and Section 2, are basic to the consideration of the case, but they are not the crimes with which the defindants are charged in count 7.

The only defendants, as I say, in that count, are Mr. Nisnewitz and Mr. LaMorte.

Mr. Ramos, who was charged in that count, as you have heard, is not before you. I shall have further reference to that.

Mr. Nisnewitz and Mr.LaMorte are accused in count 7 of another statute, which provides that if two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each shall be guilty of a crime.

Now the charge here in count 7 is based upon that statute, in that the allegation is that the defendants conspired to violate the "false statement to banks statute,"

1014, that I have discussed earlier.

A conspiracy to commit a crime is an entirely separte and distinct offense from the substantive crime or crimes which are the object of the conspiracy. Thus, ladies and gentlemen, in a conspiracy charge, there is no need to prove an actual violation of the substantive laws.

If a conspiracy existed, even if it should fail of its purpose, it is still punishable as a crime.

A conspiracy, which is sometimes referred to as a partnership in crime, because it involves collective or organized action, presents a greater potential threat to the public interest than the illicit activity of a single individual.

Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which an individual acting alone could accomplish.

It was for these and other reasons that Congress made conspiracy or concerted action to violate substantive laws a crime entirely separate, distinct, and different from the substantive crimes.

Against this background, we shall turn to the consideration of the specific charge in count 7 of the indictment.

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That count charges from on or about January 1, 1971 up to and including the date of the filing of this indictment in the Southern District of New York and elsewhere, Harold Nisnewitz, an accountant, and Jose Ramos, Jr., who at all relevant times was a loan officer of First National City Bank, and Thomas LaMorte, who at all relevant times was a loan officer of National Bank of North America, defendants, and Natalie V. Prenclau, Roger LaFerla, Gustavo Ramirez and Johnny A. Rodriguez, hereafter loan applicants named as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did conspire, confederate, and agree among themselves and with other persons to the grand jury known and unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 1014, by making false statements, reports, and wilful overvaluation of property and security in connection with the loan applications submitted by said loan applicants and others, known and unknown, to the grand jury, to First National City Bank, Manufacturers Hanover Trust, National Bank of North America, and others; all banks, the deposits of which were then insured by the Federal Deposit Insurance Corporation.

"(a) It was part of said conspiracy that said loan applicants and others known and unknown to the grand

jury, would seek bank loans and invest any funds obtained thereby in "Dare To Be Great," a pyramid selling program.

- "(B) It was further part of said conspiracy
  that defendant Nisnewitz would charge said loan applicants
  and others known and unknown to the grand jury a fee
  ranging from approximately \$100 to \$150 to cause loan
  applications continaing false information to be prepared."
- "(c) It was further part of said conspiracy
  that defendant Nisnewitz would refer said loan applicants
  and others known and unknown to the grand jury to defendant Ramos at the First National City Bank, and to defendant LaMorte, at the National Bank of North America, for
  assistance in causing said loan applications to be processed
  by said banks and that defendants Ramos and LaMorte would
  receive fees from Nisnewitz and others."

"Overt Acts."

The indictment continues:

"In furtherance of said conspiracy and to effect the objects thereof, the following overt acts among others were committed in the Southern District of New York:

"1: That on or about January 6, 1972, a loan application was submitted by Natalie V. Prenclau to First National City Bank.

"2: On or about February 3, 1972, a loan

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application was submitted by Gustavo Ramirez to First National City Bank."

Now, in order to convict any defendant on trial on this conspiracy charge, the government must prove beyond a reasonable doubt the following elements:

- "1. The existence of the conspiracy charged in the indictment.
- "2. That the defendant under considerabion by you knowingly associated himself with the conspiracy.
- "3. That one of the conspirators knowingly committed at least one of the overt acts set forth in the indictment at or about the time and place charged."

Now, let us, ladies and gentlemen, consider what is a conspiracy. The idea of a conspiracy is simple. A conspiracy is a combination, agreement, or understanding of two or more persons in confederated action to accomplish a criminal or unlawful purpose.

The essence of the crime of conspiracy is the combination, agreement, or understanding to violate other laws.

As I have already told you, the success or failure of the conpsiracy is immaterial to the question of guilt or innocence of the conspirator.

To establish a conspiracy, the government is not

required to show that two or more persons sat around a table and entered into a solemn pact, orally or in writing, stating that they have formed a conspiracy to violate the law; or the details or the means by which the object was to be achieved.

Your common sense, I am sure, will tell you that when persons in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding.

What the evidence must show in order to establish a conspiracy, that a conspiracy existed, is that its members in some way or manner, through any contrivance, expressely or impliedly, came to a common understanding to violate the law or to accomplish an unlawful plan.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged co-conspirators which are done to carry out an apparent criminal purpose.

The adage, "Actions speak louder than words," is applicable here.

Often the only evidence available is that of disconnected acts and conduct on the part of alleged individual conspirators, which acts and conduct, however, when taken together in connection with each other, and

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considered as a whole, permit an inference that the conspiracy existed as conclusively as direct proof.

In short, items of evidence are to be viewed not in isolation but in conjunction with one another and upon the totality of all the evidence.

I think I perhaps mentioned earlier that a conspiracy has sometimes been called a partnership in criminal
purposes in which each member becomes an agent of the other
member.

To become a member of a conspiracy, a defendant need not know each and every other member, nor of the participation by other members, nor the details of the conspiracy.

Each member of a conspiracy may perform separate and distinct acts at different times and in different places.

Some conspirators may play major roles while others play minor roles.

Thus, the guilt of the conspirator is not governed by the extent, duration, or whether he played a greater or lesser role.

Even if one joined the conspiracy after it was formed, and was engaged in it to a degree more limited than other co-conspirators, he is equally culpable so long

as he was in fact, you find, a co-conspirator.

In other words, it is not required that a person be a member of the conspiracy from its very start. He may join it at any point during its progress and be held by responsible for all that had been done before he joined, and that may be done thereafter during its existence and while he remains a member.

In other words, every co-conspirator is fully responsible for what every other co-conspirator does in furtherance of the conspiracy, whether he knows about it: or not, and whether he specifically approves of it or not.

That is, so long as you find he was a member of the conspiracy.

I charge you that once formed, a conspiracy is presumed to have continued until its objectives have been accomplished. So, too, once a person is found to be a member of a conspiracy, he is presumed to continue his membership there until its termination unless there is affirmative proof offered of withdrawal or dissociation.

You must first determine, ladies and gentlemen, whether or not the proof establishes the existence of the conspiracy charged in the indictment.

In deciding this first element, you must consider all the evidence which has been admitted with respect to

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conduct, acts, and declarations of each alleged co-conspirator, and such inferences as may reasonably be drawn from them.

It is sufficient to establish the existence of the conspiracy if from the proof of all the relevant facts and circumstances, you find beyond a reasonable doubt that the minds of at least two alleged co-conspirators met in an understanding way to accomplish by the means alleged one or more objects of the conspiracy as charged in the indictment.

If you do conclude that the charged conspiracy did exist, you must next determine whether any individual defendant on trial here was a member.

I charge you that the mere fact that two persons are on trial here cannot be considered by you in any way as indicating that they participated in any common plan, agreement, or conspiracy to violate the law.

Now, each defendant's participation in the conspiracy, if you find one did exist, must be established by the independent evidence of his own acts, conduct, and statements, as well as those of the other alleged co-conspirators and the reasonable inferences to be drawn therefrom.

To find that he was a member, you must, upon all

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the evidence, be satisfied beyond a reasonable doubt that, aware of its purposes, he was a willing participant with intent to advance its purposes; that he joined the conspiracy with a specific criminal intent; that is, with a deliberate purpose to violate the law.

If you do so find, then, however limited his role in furthering the objectives of the conspiracy, he is responsible for all that was done in furtherance thereof before or during its continuance.

I charge you in this connection that you may not draw an inference of participation in this conspiracy from the mere association and friendship between some alleged co-conspirators or between some defendants.

Once you are satisfied, if you are, beyond a reasonable doubt, that a conspiracy existed, and that a defendant on trial was a member, then the acts and declarations of any other person whom you also find was a member of the conspiracy made by such co-conspirators during its existence and in furtherance of its objectives are considered the acts and declarations of the defendant so found to be a member, even though he was not present.

For example, assume you find that a conspiracy existed as charged of which Mr. Nisnewitz was a member.

Then, any act, statement, or conduct of Mr. Nisnewitz in

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furtherance of that conspiracy and during its existence would be binding on such other member of the conspiracy that you might find to be such a member.

This would be true even though such other member was not present on the occasions where Mr. Nisnewitz were to act, and I say again, I am not expressing any opinion here in any way on the facts of this case, but giving this as an example were you to so find.

Summing it up in a simple way, if in fact there was a partnership in crime, each partner acts and speaks for the other in the furtherance of the partnership business, even if the other were not present.

The existence of a conspiracy and one's membership therein may be established by direct evidence or by
circumstantial evidence. Conspiracies are often not
susceptible of proof by direct evidence. Usually, they
are established as a matter of reasonable inferences
based upon circumstantial evidence.

Direct evidence is where a witness testifies to what he saw, heard, and observed, and what he knows of his own knowledge, that which came to him by virtue of his senses.

Circumstantial evidence, on the other hand, is where facts are established from other facts, from which,

in terms of common experience, one may logically infer the fact sought to be established.

Let me give you an example. Assume that when you entered this courtroom this morning, the sun was shining brightly, as it was, and it was a clear, warm day, and there was no rain and the sky was clear.

Also assume that these blinds were drawn so that you could not see out, and as you are sitting in the jury box, somebody walks in with an umbrella which is dripping with water, followed in a short time by a man with a raincoat also dripping with water.

You cannot look out and see if it is raining, and you cannot say of your own knowledge that it is raining, but from the evidence before you, even though when you entered the building, it was not raining, it would be reasonable and logical for you to conclude that it had commenced to rain after you came in the building.

That's all there is to circumstantial evidence.

You infer on the basis of reason and experience, from an established fact to the ultimate fact to be proved.

Circumstantial evidence, if you believe it, is of no less value than direct evidence, for in either case, circumstantial or direct, ladies and gentlemen, you must be convinced beyond a reasonable doubt of the guilt of any

defendant on any count.

In this case, the government relies on both direct and circumstantial evidence.

Whether a defendant knowingly and intentionally participated in the claimed conspiracy, that presents for you an issue of fact. Clearly this concerns what is going on in a person's mind. Medical science has not yet devised an instrument by which we can go back to the time of the occurrence of events and determine what was a person's intent or knowledge.

These may be determined, however, from ones' acts, one's conduct and surrounding circumstances, and such inferences as may reasonably be drawn from those.

If you find circumstances of secrecy, intrigue, or attempts to conceal the true nature of the transactions, these may be considered by you as circumstantial evidence of craminal intent.

If you find that any defendant, when questioned by anyone gave a false statement in an attempt to exculpate or exonerate himself, you may consider such false statement as circumstantial evidence from which consciousness of guilt or criminal intent may be inferred; for it is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate an

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explanation or statement tending to establish his inno-

Whether or not evidence as to a defendant's explanation or statement points to a consciousness of guilt,
and the significance, if any, to be attached to any such
evidence, are matters for determination solely by you.

proof of motive is not a necessary element of
the crime with which the defendants are charged. Proof
of motive does not establish guilt, nor does want of proof
of motive establish that a defendant is innocent.

reasonable doubt to your satisfaction, it is immaterial what the motive for the crime may be or whether any motive be shown; but the presence or absence of motive is a circumstances that you may consider as bearing upon the intent of a defendant; so, too, it is not necessary for the government to show that a defendant had a financial interest in the conspiracy.

His interest may be that of seeking by his action to make the conspiracy succeed. The stake was the success of the enterprise.

Mere association of a defendant with an alleged co-conspirator or co-conspirators does not establish his participation in the conspiracy, if you find that one

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did exist, nor is knowledge of the illegal acts of others sufficient. Thus, the mere existence of association or friendship between a defendant and alleged co-conspirator by itself would not be sufficient to establish that defendant's participation in the conspiracy.

Ladies and gentlemen, I am going to take a break for about ten minutes here. I have a little bit to go and you have been paying very careful attention, and I think it is time that we take a brief recess.

We will take a recess for five, six, seven minutes.

Marshal, you will accompany the jurors to the jury room and the door will remain locked.

(Recess.)

mpb:mg 40

THE COURT: Now, to continue, ladies and gentle-

Likewise, if a person acts in a way which furthers a conspiracy but has no knowledge of it, he does not thereby become a participant.

What is necessary, as I have already said, is that the defendant participate in the conspiracy with knowledge of at least some of its purposes and the intent to aid in the accomplishment of its unlawful ends.

If you find the government has sustained the

element as to a defendant's knowing participation, then we reach the next element

The third essential element of the crime of conspiracy is that an overt act intended to effect the object of the conspiracy be committed by at least one of the
co-conspirators after the unlawful agreement has been
made.

Anovert act is any step, action or conduct which is taken to achieve, accomplish, or further the objective of the conspiracy.

The purpose of requiring proof of an overt act is that while parties might conspire and agree to violate the law, they may yet change their minds and do nothing to carry it into effect, in which event it will not constitute an offense.

The overt act need be neither a criminal act nor the very crime which is the object of the conspiracy. Thus, in this case, the overt acts listed in the indictment are that on or about January 6th, 1972, a loan application was submitted by Natalie V. Prenclau to First National City Bank.

2: That on or about February 3, 1972, a loan application was submitted by Gustavo Ramirez to First National City Bank.

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Thus for Natalie Prenclau to submit a loan application to a bank by itself may well be innocent conduct, but if, as the government contends, it contained a false statement to induce the First National City Bank to lend money where it otherwise might not have, then it is an overt act by an alleged co-conspirator in furtherance of an objective of the conspiracy.

Similarly as to the other overt act, if it relates to a matter you find in furtherance of the conspiracy.

It is not necessary for the government to prove that each member of the conspiracy committed or participated in a particular overt act, since the act of any member done in furtherance of the conspiracy becomes the act of all the other members.

Also, the government is not required to prove each of the overt acts as alleged in the indictment. It is sufficient if it proves the commission of at least one of them in the Southern District, which includes the City of New York, at or about the time alleged, although in this case, the government claims that it has proved both of the overt acts as set forth in the indictment.

The overt act need not have occurred at the precise time or place as alleged. So, too, while the indictment charges that the conspiracy began on or about

January 1, 1971, and continued thereafter up to the date of the filing of the indictment, January 30, 1974, it is not essential that the government prove the conspiracy started or ended on or about these specific dates.

It is sufficient if you find that in fact a conspiracy was formed and existed for some subsntial time within the period set forth in the indictment, and that at least one of the overt acts was committed in furtherance of its objectives during that period.

With these general principles as a guide, you will consider whether the government has, by the required degree of proof, established the essential elements of the conspiracy.

Since the issues are rather narrow, and the trial relatively short, and since counsel have just summed up and reviewed the testimony in some detail, and urged upon you their respective contentions, I shall not make any reference to the evidence. But all evidence, whether or not I refer to it or counsel have alluded to it, is important, and must be considered by you.

If perchance, and I am repeating myself here,
I know, any reference by counsel to the testimony does
not agree with your recollection, you are to disregard
such references, and I emphasize this as strongly as words

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can convey. Always, it is your recollection and yours alone that governs, and you must unhesitatingly reject any statement as to any fact which does not accord with your own recollection.

You are called upon, as I said at the outset, to decide the fact issues. How do you go about deciding this?

Your determination on the issues of credibility must largely depend on the impression that any witness and made upon you as to whether or not he was telling the truth or giving you an accurate version of what occurred.

The weight of the credible evidence on any issue is not necessarily determined by the number of witnesses testifying thereto.

You must consider all the facts and circumstances in evidence to determine which witness or witnesses are worthy of greater credence.

It is the quality of the evidence to which you must look and not just the mere number of witnesses alone.

I think I have mentioned before that when you walk into the door of this courtroom and sit in the jury box, during the time of the trial and while you are deliberating, you use your common sense and your good judgment and your experience.

mpb:mg 45

You decide whether a witness was straightforward and truthful, whether he attempted to conceal anything, whether he had a motive to testify falsely, whether
there is any reason why he might color his testimony; in
other words, what you try to do is to dize a person up just
as you would do in important matters where you were undertaking to determine whether a person is truthful and candid
and straightforward.

In passing, ladies and gentlemen, in passing upon the credibility of a witness, you may also take into account inconsistencies or contradictions as to material matters in his own testimony or inconsistencies or contradictions, if any, between trial testimony and any prior statements, such as grand jury statements or statements to an FBI agent.

I do want to say that a witness may be inaccurate, contradictory, or even untruthful in some respects and yet be entirely credible in the essentials of his testimony.

The ultimate question for you to decide in passingupon credibility is, did the witness tell the truth here before you as to essential matters?

It is for you to say whether a witness at this trial is truthful in whole or in part in the light of his or her demeanor and all the exidence in the case.

The law permits, but does not require, a defendant to testify in his own behalf. Mr. Nisnewitz has taken the witness stand. Obviously, he has had a deep personal interest in the result of this prosecution. Indeed, it is fair to say that he has the greatest stake in its outcome.

Interest creates a motive for false testimony.

The greater the interest, the stronger the motive, and a

defendant's interest in the result of his trial is of a

character possessed by no other witness.

In appraising his credibility, you may take that fact into consideration.

However, and I say this equally strongly, it by no means follows that simply because a person has a vital interest in the end result, that he is not capable of telling a truthful, candid, and straightforward statement.

It is for you to decide to what extent, if at all, his interest has affected or colored his testimony.

Mr. Ramos, who testified extensively here and upon whom the government relies, asserts that he was a participant in the conspiracy alleged in the indictment.

There is no requirement in the federal courts
that the testimony of a self-proclaimed accomplice be
corroborated. A conviction-may rest upon the uncorroborated

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testimony of such a person if you find it credible and believable.

Parenthetically, however, it should be pointed out that the government here does claim corroboration as to portions of Ramos' testimony by independent proof from other witnesses and also from documentary evidence.

That Ramos asserts that he is an accomplice may be considered by you as bearing upon his credibility.

This is equally true as to the alleged co-conspirators who were named as such in count 7 of the indictment, but were not indicted.

However, just as in the instance of a defendant who has an interest in the outcome of the case, it does not follow that just because a person asserts participation in a crime, that he is not capable of giving a truthful version of what occurred.

His testimony, however, should be viewed with great caution and scrutinized carefully.

Did Ramos or any other alleged co-conspirator give false testimony or color testimony contrary to fact hopeful his or her testimony would result in immunity from prosecution on this charge or as to Ramos, would result in favorable treatment upon sentencing? Or did these witnesses make a clean breast of wrongdoing and tell the

truth as to significant matters?

I want to say to you that it has been brought out before you that Jose Ramos took a plea of guilty to count 7 of this indictment, the conspiracy count.

I want to tell you that the fact that Mr. Ramos entered such a plea does not mean that the remaining defendants, Mr. Nisnewitz or Mr. LaMorte, are guilty with him .

His plea is not evidence that defendants Nisnewitz or LaMorte are guilty, nor is it any evidence that the? crime charged in count 7 of the indictment was committed; nor does Mr. Ramos' plea give rise to any inference of guilt as to the remaining defendants on trial.

The guilt or innocence of defendants Nisnewitz and LaMorte must be determined by you solely upon the evidence introduced in the trial of this case.

I say if you find that any witness' testimony was deliberately untruthful, you should unhesitatingly reject it. If, on the other hand, upon a cautious and careful examination, you are satisfied that such witness has given a truthful version of essential events, there is no reason why you should not accept such witness' testimony and act accordingly.

If youfind that any witness has wilfully testified

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SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY WARE NEW YORK NY CO 7 45HD falsely as to any material matter, you may reject the entire testimony of that witness; or you may accept that part or portion as commends itself to your belief; or which you may find correborated by other evidence in the case.

Defendant LaMorte has not testified in this case.

That is his absolute right, and I instruct you that in
no respect may such failure to testify be considered by
you as any evidence against him or as the basis for any
presumption or inference unfavorable to him at all.

You must not permit such fact to weigh in the slightest degree against him nor should it enter into your deliberations or your discussions.

Defendant LaMorte has called a witness who has given testimony as to his character or perhaps more correctly as to his reputation in the banking community for honesty, truthfulness, and integrity.

You should consider this evidence together with all other evidence, in determining his guilt or innocence.

Evidence of good reupitation may in itself create a reasonable doubt where, without such evidence, no reasonable doubt would exist; but on the other hand, if from all the evidence, you are satisfied beyond a reasonable doubt that LaMorte is guilty, ashowing that he

previously enjoyed the reputation of good character does not justify or excuse the offense; and you should not acquit him merely because you believe he has been a person of good repute.

During the course of the trial, the attorneys at various times have objected to certain questions, have moved to strike answers, have taken other procedural positions before me, and in your hearing.

These are matters of technical procedure that are the proper concern of the attorneys in the court and should not and must not concern you.

I instruct you, you are not to draw many inferences from the fact that attorneys have made objections and motions before you during the trial or from any ruling that I may have made upon any of them.

The government, to prevail, must prove with respect to count 7 the essential elements by the required degree of proof as I have already instructed you. If it succeeds, your verdict should be guilty.

You must consider, again, I say, each defendant separately. If it fails, it should be not guilty. The case of each defendant must be considered separately, as if he were alone on trial, and you will return a separate verdict as to each defendant.

Thus, there are various verdicts that can be returned.

On counts 1 to 6, they involve Mr. Nisnewitz alone, and your verdict should be guilty or not guilty as to those counts on him alone.

As to the conspiracy, your deliberations can results in a finding, depending upon what you find to be the facts, that both defendants are not guilty, that both are guilty, or that one is guilty and one is not guilty.

Your verdict in each instance must be unanimous.

Your function is to weigh the evidence in the case, and
determine the guilt or innocence of each defendant on
each count in which he is named, solely upon the basis
of the evidence and these instructions.

Under your othas as jurors, you cannot allow a consideration of any sentence which may be imposed upon a defendant if he is convicted to enter into your deliberations or to influence your verdict in any way.

Your duty is to decide this case solely upon the evidence and upon these instructions as to the law.

In the event of a conviction, the duty of imposing sentence rests solely with the Court.

Each juror is entitled to his or her own opinion but each should, however, exchange views with fellow

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jurors; that is the very purpose and meaning of jury deliberation, to discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your individual views, to sult with one another, to reach an agreement based solely and wholly upon the evidence, if you can do so without violence to your own individual judgments.

Each one must decide the case for himself and herself after consideration with his or her fellow jurors, but you must not hesitate to change an opinion which, after discussion with your fellow jurors, appears erroneous.

However, if after carefully considering all of the evidence, and all of the arguments of your fellow jurors, you entertain a conscientious view that differs from others, you are not to yield your conviction simply because you are outnumbered or outweighed.

However, your final vote must reflect your conscientious conviction as to how the issues should be decided.

The charge here is serious. The just determination of this case is important to thepublic, and as I have said, it is equally important to these defendants.

Under your caths as jurors, you must decide this case without fear or favor, and solely in accordance

with the evidence and the law.

If the government has failed to carry its burden as to any defendant on any count, your sworn duty is to acquit.

If it has carried its burden as to any defendant on any count, you must not flinch from your sworn duty, and you must find him guilty.

Now, ladies and g entlemen, that concludes my charge upon the law.

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Ms. Hynes and Mr. Friedman and Mr. Drescher, have you any matters you would like to bring to my attention at this time?

MS. HYNES: Yes, your Honor.

THE COURT: All right, shall we retire to the robing room?

Will you remain in place while the attorneys and I confer upon matters of law which are not matters for your consideration.

(In the robing room.)

THE COURT: Why don't I hear from the defendants first?

MR. FRIEDMAN: Your Honor, I will take exception to your Honor's statement that thepurpose and age as a matter of law has been proven and is --

THE COURT: I think I allowed you that before-

MR. FRIEDMAN: Before. All right.

I think that your Honor in fairness should advise the jury that the missing documents, the check, the W-2 form, and the Manufacturers Hanover application from LaFerla is not evidence. The fact that it is not here is not evidence and should not be considered.

MS. HYNES: There is testimony as to that.

I don't understand your point.

THE COURT: I think that is embodied in the testimony which I declined to comment upon, and given the shortness of the case and the relative simplicity of the issues, therefore I decline to so instruct.

Mr. Drescher?

MR. DRESCHER: Yes, sir, the first thing was that, and I know I got it wrong when I wrote it, in discussing Section 2 as to aiding and abetting, I wrote down that you said "even if he is an innocent intermediary, he may be convicted."

Now I am sure that I got that cockeyed.

if I did. Does anybody else remember that?

MR. DRESCHER: I doubt it. All right.

THE COURT: No.

MR. DRESCHER: then there is one other thing and only one other thing. Your Honor charged the jury that the false statement made by a defendant may be construed as circumstantial evidence and may be considered on the question of a consciousness of guilt, and you stopped there.

I think that you should go a bit further and say, however, there may be a false statement made for other

motives other than as a showing of consciousness of guilt.

In other words, you stopped there, where you said may be considered on the question of the consciousness of guilt.

I don't think anything further was said on it.

THE COURT: Mr. Drescher, what is it that you would have me charge? I am inclined to supplement my instructions in some reasonable way.

MR.DRESCHER: I would say that on occasion,
a false statement might be made by a defendant, and the
jury should consider whether that was made by other motives
which were entirely independent of any consciousness of
guilt or of any criminality.

MR. LAWYER: Your Honor, the defendant made a false statement under oath which is what happened in this case, at least what the government contends in the grand jury.

I mean, normally, even though he is not charged with perjury, that would in fact be perjury.

There is no excuse for making a false statement.

THE COURT: I know but the question is whether it is evidence of his participation in this conspiracy, and I think Mr. Drescher's point is well-taken. Iam going to give some supplementary charge in that regard but it is

a question of how to phrase it.

MR. LAWYER: I beliefe the Court used the word "may" and that alone--

MR. DRESCHER: It may consider.

MR. LAWYER: That raises the possibility that it may or may not.

MR. DRESCHER: But it also may be considered as not on the question of consciousness of guilt. That is the point.

MR. LAWYER: By definition, if you use the word "may," that is what you're saying.

MR. DRESCHER: In other words, I said in my summation to the jury that if this LaMorte did lie to a jury, and made a false statement --

THE COURT: Mr. Drescher, you don't have to convince me. I am going to give something here in that regard.

THE COURT: Now, Mr. Drescher, I had in mind -come look over my shoulder, sir, if you will, so that -I had in mind to tell the jury that I had earlier charged
them in part as follows:

If you find that any defendant when questioned by anyone, gave a false statement, you m ay consider such false statement as circumstantial evidence from which consciousness of the incriminating intent may be inferred.

I also charge you that if you find that a false statement was made by a defendant for other reasons other than to exculpate himself, then you may not regard that statement as any evidence from which consciousness of guilt or criminal intent may be inferred.

MR. DRESCHER: In this crime charged.

MS. HYNES: There is absolutely no evidence in the record other than Mr. Drescher's statement on summation as to what other evidence there could be, so on the basis of the record now, there isn't any justification for that charge.

MR. DRESCHER: You mean there is no evidence either in the record that the only reason he lied was because he was guilty?

MR. LAWIER: The word "may" by definition, we submit, a false exculpatory charge that has been standard language since 1957.

MR. DRESCHER: It comes down to a very simple thing. A man may lie and not be guilty of a crime for an entirely different reason, and that is all.

THE COURT: Mr. Drescher, you want me to add the words "in this case"?

MR.DRESCHER: Yes, your Honor, under the crime here charged.

THE COURT: As to the crime here charged. In other words, my addition will be --

MR. DRESCHER: I wonder if we could use-- I think the jury will understand exculpate to excuse.

THE COURT: If they didn't understand it before, they are not going to understand it any more now.

If you find, and I have a feeling there is going to be no problem with them in that regard because they seem to be a bright jury, and have been paying very close attention to the entire charge.

MR. DRESCHER: I think they have.

THE COURT: If you find that a false statement was made by a defendant at any time for reasons other than to exculpate, then you may not regard that statement as any evidence from which consciousness of guilt or criminal intent may be inferred as to the crime here charged.

Does that satisfy you?

MR. DRESCHER: I think that covers it:

THE COURT: That is the reverse of the government's position and if the government says if you find that he did, all you are asking me to do, Mr. Drescher, is to say if you don't find that he did, and I think that is fair enough.

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this.

MR. DRESCHER: That is exactly --

MS. HYNES: There is a little bit more because the government has put in on this case that there were false exculpatory statements. There has been no evidence.

THE COURT: You put in there were false statements.

MS. HYNES: And this was corroborated by Mr. Ramos.

THE COURT: The question is what the purpose

was and I think the purpose is sufficiently open to allow

I take it, Mr. Drescher --

MR. DRESCHER: I have nothing else and I certainly don't except to the charge in any way, shape or manner.

I think it is excellent, sir.

MR. LAWYER: Your Honor, could we ask then if that is going to be charged, that the entire false exculpatory statement charge be read and that simply be appended to it? We don't think there's any evidence whatsoever to support the charge that has been requested by defense counsel, so we ask, we think in total fairness, that then the entire charge be read again, including, if the Court insists upon reading it, what Mr. Drescher has asked.

MS. HYNES: Your Honor, I just want to put on

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the record that on page 29 of the government's requests to charge, which is request No. 18, the second full paragraph says "whether or not evidence as to a defendant's explanation or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence are matters for determination by you."

Thatis Mr. Drescher's point.

THE COURT: I appreciate that.

MR. DRESCHER: That is exactly it. That was left out in the charge, though.

THE COURT: No, I gave that. That was given.

MR. DRESCHER: Oh, yes, yes.

MS. HYNES: Maybe that is the end of it.

MR. DRESCHER: At this point I think they are wellentitled to it. We just don't want the jury confused, that's all.

THE COURT: I don't think I am going to read the entire thing because I think we are making too much of an issue out of it. I think it's been clearly stated but have you any other specific requests?

MS. HYNES: Yes, your Honor.

Your Honor stated earlier this morning that you would charge the jury that as to the substantive counts

1 through 6, the government need not prove each and every

false statement alleged in each count, but it was sufficient if the government proved at least one false statement.

THE COURT: I thought I did.

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MS. HYNES: You did not.

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THE COURT: I thought I did.

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MR. FRIEDMAN: That was my impression.

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THE COURT: I thought I covered it.

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MR. DRESCHER: I was quite sure you did charge

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it. It didn't have to be the whole thing, but one mis-

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statement.

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THE COURT: I have covered that. I decline to repeat that portion of the charge and highlight it at this time.

MS. HYNES: As the record now stands, it simply says statement or statements and that could refer to each of the counts or each statement in it.

THE COURT: No, I said as to each count, the false statement or statements or any of them.

MS. HYNES: There is one count, count 1; which has one false statement. All the other counts have several statements. It could be construed as that is what you are referring to, to count 1 and to count 2 through 6.

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MR. LAWYER: We submit that blows the government's case right out of the water. If the jury looks at that indictment and finds they have to find every statement false -- jurors frequently come back, especially in perjury-type counts, and ask whether or not we have in fact to find that every single statement is false.

MR. FRIEDMAN: I think if they come back, your Honor could charge them at that time.

MR. LAWYER: But meanwhile they are going --MR. FRIEDMAN: If there is any problem, they will come back.

THE COURT: I am not going to highlight that, lady and gentlemen, to this jury afterward.

Now, anything further?

MS. HYNES: We are asking for an aiding and abetting charge in connection with conspiracy.

(Discussion off the record.)

THE COURT: Would it satisfy you if I stated that the aiding and abetting section as to which I earlier charged is charged in connection with the conspiracy, and you may apply such principles from that as you feel are appropriate?

I am not going to read the whole thing over again,

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that I guarantee. So let's not get into that. I am not going to read the entire aiding and abetting section over. I read it very clearly one time.

MR. LAWYER: We are simply going to have to be satisfied.

MS. HYNES: We will have to be satisfied with that.

THE COURT: I see no point in reading that section all over again. I make reference to it at the beginning of conspiracy. I am prepared to say that the aiding and abetting, shall I call it that, the aiding and abetting statute.

MS. HYNES: I think it's been referred to as aiding and abetting.

Your Honor, I am going to make one last pitch that in the false exculpatory statement, it has been brought out there is a paragraph which I read to Mr. Drescher and he said that is fine if it was read, and it was read and it is very clear and it was read the first time through.

THE COURT: All right; now Ms. Hynes, I will say this. "I further instruct you that the aiding and abetting statute Title 18 U.S.C. Section 2, as to which I earlier instructed you in detail, is equally to be

considered by you on the conspiracy count, should you find it applicable.

MS. HYNES: All right.

The government would still prefer the reading of the aiding and abetting but if we can't, we can't.

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And the final statement is simply really that if we are going to clarify the false exculpatory statement portion, we should clarify the one issue raised by the government, which is that it was not clear, and I was listening for it myself that the government need only prove one of the false statements in each of the counts, and if there is a clarification as to the false exculpatory statements for defendant, the government is entitled to have a clarification of that.

The record would seem to be clear supposedly on both of those.

MR. DRESCHER: One has nothing to do with the other.

MS. HYNES: I don't say it does. If the Court charged as he did, very clearly, on the false exculpatory statement, but we are reclarifying it, then even if the Court determines that it was charged on the number of —that the govferment need only prove one statement, we are entitled to a reclarification of that.

The only other, the last thing is -- I do not want is a reasonable doubt charge read again, but there was language in there that they'd have to find to a moral certainty, and it was my understanding that that was not going to be charged.

THE COURT: When I was giving consideration in this whole area and finding that some of my colleagues had charged that, I decided to charge that.

In any event, I am in no position to take back the words and strike it from the jury's mind.

MR. LAWYER: Obviously exceptions to the charge mean nothing to the government. If we win, we don't appeal and if we lose, we can't appeal, so it makes no difference.

MR. DRESCHER: I don't take any exceptions either.

THE COURT: I have been considering Ms. Hynes' position here on this thing. What I am going to do is to have Mr. Birnbaum read very briefly that section of my original charge on the substantive counts. I am going to preface that by saying, "In reference to the substantive counts 1 to 6, as to the requirements of proof" --

MR. LAWYER: I don't understand fully.

THE COURT: I am going to say, "I am going to have the reporter reread to you that portion of the charge in the event there is any misconception as to how I charged in this area."

MR. LAWYER: In other words, the same charge is simply going to be repeated?

THE COURT: Repeated.

MR.LAWYER: The charge that we are unhappy with.

THE COURT: That may be but--

MR. LAWYER: I am trying to determine what is the difference; why read it at all?

THE COURT: It was claimed that the people did not catch it in the flow of my charge. I am going to have it reread, so that there is no question that it has been spoken so that everybody catches it.

MR. LAWYER: I understand.

THE COURT: All right.

Now, with respect to the substantive counts—
this is what I am going to read— I am going to preface
Mr. Birnbaum's "Read" — with respect to the substantive
conts 1 through 6, I am going to have Mr. Birnbaum reread one of the elements which the government must prove
beyond a reasonable doubt.

Mr. Birnbaum, when you are reading that and you

come to the place that says "each must prove as to any count a false statement or statements or any of them," would you please make sure that that language is fully audible through the entire courtroom?

(In open court.) (Jury present.)

THE COURT: Now, ladies and gentlemen, I will give you a few further brief instructions.

With respect to the substantive counts 1 through 6, I am going to have Mr. Birnbaum re-read to you one of the elements which I charged you that the government must prove beyond a reasonable doubt.

(Portion of charge read.)

THE COURT: This is with reference to the false statements alleged. Those are the statement or statements or any of them. This does not mean that the government is required to prove each and every statement.

Now, I further charge you in connection with the subject of claimed exculpatory statements; I charged you in part in my charge, if you find that any defendant when questioned by anyone gave a false statement in an attempt to exculpate or exonerate himself, you may consider such false statement as circumstantial evidence from which consciousness of guilt or criminal intent may be inferred.

I further charge you that if you find that a false statement was made by any defendant at any time for reasons other than to exculpate himself, then you may not regard that statement as any evidence from which consciousness of guilt or criminal intent may be inferred as to the crime here charged.

Finally, I further charge you that the aiding and abetting statute, Title 18, United States Code, Section 2, as to which I earlier instructed you in detail, is equally to be considered by you on the conspiracy count, count 7, should you find it to be applicable in any way to the facts that you are considering on that count.

Now, ladies and gentlemen, with those supplementary instructions, if you will please retire to the jury room - and before going, we will swear the marshal, -- It is my duty at this time to thank the alternate jurors for their faithful and considerate service here and to excuse you with the thanks of the Court.

(Two U.S. Marshals duly sworn.)

(At 12:25 p.m., the jury retired to deliberate.)

THE COURT: I am sure the jury is going to ask for exhibits. I take it that all are in readiness, that extrapolations that are required to be made have

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THE CLERK: United States of America v.

MS. HYNES: Government is ready, your Honor.

MR. BRODSKY: Defendant is ready, your Honor.

THE COURT: Mr. Brodsky, I understand you have some motions that you wish to urge as threshold questions?

MR. BRODSKY: Yes, your Honor. Thank you.

At the outset, your Honor, I would move to
dismiss Counts 2 -- 3 and 5 of the indictment, on the
grounds that there is no venue in the Southern District
of New York.

And I would urge, your Honor, that there is no venue for two reasons: First, the crime that was committed was a crime of aiding and abetting the filing of false bank statements in a bank in Queens. That is the Manufacturers Hanover Trust Company where Mr. Westphal was the bank manager.

The evidence, as I understand the evidence to have been, is that all the acts were committed in the Eastern District of New York, with the sole exception of the processing of the loan application in the Southern District of New York.

In a similar situation before Judge Lasker,

Judge Lasker dismissed an indictment based solely upon two counts, where bank applications had been submitted to the same bank. And I would urge your Honor that the principle of law would be that venue attaches where the crime is committed, and the crime in this case was not influencing the main branch of the bank at Four New York Plaza where the bank applications were processed, but in fact to influence a specific bank officer or a specific bank branch in Queens.

As I understand the evidence to have been, there was no evidence indicating that Mr. Nisnewitz knew that bank applications were processed in Manhattan and that in fact the thrust of the evidence was that he had some influence or sway over this particular branch manager, Mr. Westphal.

And so I would urge your Honor to dismiss the indictment-- to dismiss those counts of the indictment based upon the improper venue argument.

THE COURT: Before I ask you a question about that, Ms. Hynes, do you want to respond to that?

MS. HYNES: Yes, your Honor.

THE COURT: You have given me a brief, which I have studied, and I have read Candella.

MS. HYNES: All right.

Your Honor, with all due respoect to Judge Lasker --

THE COURT: That is the question that I am most troubled about.

MS. HYNES: Well, let me tell you what the circumstances of that decision were. Actually, at the end of it, I think it was the government's case, Mr. Brodsky made a motion on venue.

Judge Lasker reserved decision and said that
he would rule on it after the jury had deliberated. And
if there was a conviction, then he would rule on the venue
motion, and if there wasn't a conviction, there would be
no need to rule on the venue motion.

And this was late in the morning. We broke for lunch. And when we were coming back, there was the expectation by all counsel that we would sum up and the case would go to the jury.

When we came back from lunch, Judge Lasker decided that he was going to rule on the venue motion, so we had not the opportunity to bring the Candella case to his attention.

However, we had submitted to him a memo that we had prepared in the case before your Honor on venue, although it had not been raised, the Candella case was not raised in that memorandum.

And on the cases in thememorandum submitted to Judge Lasker, and particularly the-- first of all, the statute itself, which says that a crime begun in one district and continued in another can be prosecuted in any district, and indeed, under your mail fraud prosecution, while I know this is not a mail fraud prosecution, the cases go so far as to say that in any district through which the mail passes you could have proper venue when there is a cite, a decision by a judge which adds to that effect in the government's brief.

But in any event, the Greenberg case and the other cases cited by the government that were given to Judge Lasker were sufficient. Judge Lasker decided otherwise.

And we, frankly, it is our position that he was wrong, but we were unable to sway him and he did not have the Candella case in front of him, which is really on all fours. And the Second Circuit has really definitively ruled that on facts so substantially similar that I don't think they can be distinguished --

THE COURT: Let me ask Mr. Brodsky how he deals with Candella, because that to me does seem to be standing squarely across the argument that you are taking.

MR. BRODSKY: It seems to on its surface, your Honor; the only solace that I find, frankly, in the Candella opinion is Judge Mulligan's observation at page 1228 that the force propelled here by the defendants; immediately contemplated Manhattan. And I am not familiar enough with the evidence on Candella, nor, frankly, am I familiar enough with all of the evidence in this trial, to know whether there was any hint of any evidence at the Candella trial to indicate that the defendants knew that the Urban Renewal papers there were going to be filed in Manhattan.

But I suspect that from Judge Mulligan's observation, that they immediately contemplated Manhattan, that there was some evidence that the government adduced that for the convenience of the parties, the papers were just processed in Brooklyn and then sent across the river to Manhattan.

In any event, the opinion does not speak of the defendant's knowledge as having any relevance to the issue at all. Judge, it does not, except in that phrase "contemplated Manhattan."

I would argue that that phrase seems to imply that there was some evidence at the trial that the defendants had knowledge of what was happening in Manhattan.

In this trial there was no evidence that the defendants had knowledge—the defendant had knowledge of what was happening in Manhattan. And I don't think it is solely for the convenience of theparties that the bank applications were sent from Queens into—were accepted in Queens and sent into Manhattan.

I think it really is on the other foot, as a matter of fact. It seems to me it is the convenience of the bank to have branch offices available for customers in boroughs other than Manhattan, and that it is for the convenience of the bank that they advertise that loan applications can be made at any branch, not just at the main branch, and it induces the defendant, as in this case, to believe that he was influencing the act of a bank in Queens.

The statute unde- which Mr. Nisnewitz was indicted seems to indicate that "for the purpose of influencing in any way the action of a bank" would contemplate the bank that he went to or caused others to go to, to file false bank applications.

I am not able to structure at this moment, your Honor, a better distinction of Candella other than Judge Mulligan's observation of contemplation of Manhattan.

THE COURT: I feel constrained to deny the

motion to dismiss.

You have a second motion?

MR. BRODSKY: I do, your Honor, and I have not had an opportunity to prepare a brief, but late this afternoon, I did send a letter to your Honor's chambers with some citations.

THE COURT: Right.

MR. BRODSKY: Ms. Hynes unfortunately did not receive a copy of the letter, but I provided her with a copy of it and some abstract of cases.

THE COURT: I looked at one of the authorities that was cited, and Mr. Sudler is getting it for me.

The problem that I am faced with is that in that decision, which shall be forthcoming in a second. -

MR. BRODSKY: Would your Honor prefer that I wait for my argument?

THE COURT: Well, go ahead with your argument while this volume is being brought, and then I can focus better on what I have.

MR. BRODSKY: Thank you.

Briefly, your Honor, my argument is structured upon two hypotheticals, one of which is that the defendant Ramos-- that there was insufficient evidence for a jury to find a conspiracy between the defendant Ramos

and the defendant Nisnewitz, and I am basing this upon an understanding of the facts as related to me by trial counsel at the trial.

I understand the facts to have been that there was little evidence at the trial indicating the relationship between Ramos and Nisnewitz.

I therefore proceed to the next statement, your Honor, which is that in order for the jury to find a conspiracy, they would have had to have found a conspiracy not between Ramos and Nisnewitz, since there was insufficient evidence to base a finding on that, but a conspiracy between LaMorte and Nisnewitz.

And that by acquitting LaMorte of conspiracy, they found no conspiracy existed involving my client Nisnewitz, and therefore the jury's verdict of conviction could not stand on that count.

And I am relying on cases, your Honor, which stand for the general proposition that if there are two conspirators indicted and one is acquitted, the conspiracy conviction of the second cannot stand.

Of course, those cases are distinguishable from the case here, because in this case, there was a selfconfessed conspirator who pled guilty and took the stand.

THE COURT: Mr. Brodsky, let me stop you,

because I think that factually you are not on shaky ground, you are on I don't think any ground at all.

We do not have a trial transcript here, but my trial minutes show one Ramirez giving testimony that he went to Nisnewitz for one of these loans and that after one, Westphal, denied it, Nisnewitz said he would\_ speak to Ramos and take care of it.

Then we have Mr. Ramos himself testifying that as to the Ramirez loan, Nisnewitz called and said - and I have in my noates practically a quote -- Ramirez would come and wanted a personal loan. And then Ramirez came in with an application and he mentioned Nisnewitz' name and he showed the W-2 but not the birth certificate.

I believe that that is sufficient conspiratorial connection between Nisnewitz and Ramos to support the jury's verdict of a conspiracy between them, if indeed there isn't a great deal more. But I think that that at a minimum is enough to have warranted the jury finding the way it did.

MR. BRODSKY: I understand, your Honor, and on the basis of that evidence, I would gather that your Honor would be denying my motion based upon my very first hypothetical?

THE COURT: As I read Herman v. the U. S. where

it says at 289 Federal Reporter 2d 368; it says "The quibble of one conspirator is immaterial where there are several other co-conspirators or several other conspirators charged with an unknown."

Here we have evidence in fact of a conversation with Nisnewitz saying "I am sending the man over for a loan."

MR. BRODSKY: Your Honor, I really rely on the next sentence of that opinion stating "Where all but one of the charged conspirators are acquitted, the verdict against the one will not stand."

THE COURT: Yes, the one that pleaded.

MR. BRODSKY: The basis of my argument was that there was insufficient evidence to find a conspiracy between Ramos and Nisnewitz, and it really goes to a weighing of the evidence, and your Honor has pointed to the pieces of evidence in the trial which indicate that the jury may have had some foundation for making it.

THE COURT: I appreciate, you know, that you are taking a position here, and I also appreciate the fact that you are doing it, not having tried the case and upon the recollection of others.

MR. BRODSKY: Yes, your Honor.

THE COURT: But on what my notes show, I feel

that I must deny that motion, unless there is an additional ground on which to urge it.

MR. BRODSKY: No, there is not, your Honor.

THE COURT: That motion is denied.

Now, are we ready for sentence?

MR. BRODSKY: The defendant is ready.

May I make a brief statement?

THE COURT: Yes. I was going to say, before I reach you, Ms. Hynes, is there anything that you wish to say on behalf of the United States?

MS. HYNES: No, your Honor. Your Honor sat through the trial, heard the evidence, heard the testimony of the defendant on the stand, and heard the testimony of the defendant in the grand jury, and heard the testimony of all of the witnesses that the government called, and I think that that is really what we are relying on here. We have nothing further to add to that.

THE COURT: Mr. Brodsky.

MR. BRODSKY: Thank you, your Honor.

I am looking, while I am rising, for a letter, which I want to bring to your Honor's attention, from Mr. Nisnewitz' doctor, because in your Honor's allowing me to review questions of the pre-sentence report, I saw a reference to the fact that there had not been sufficient

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medical information presented to the Court, to the Probation Officer to allow the Probation Officer to have any judgment about medical information.

I have the original somewhere in my file, but I also have a Xerox copy if I could hand that to your Honor.

THE COURT: Surely.

MS. HYNES: Do you have a Xerox for me?

(Handed.)

THE COURT: I have read Dr. Nema's letter.

Go ahead.

MR. BRODSKY: Your Honor, I would point out some facts which I think are alluded to in the pre-sentence report about Mr. Nisnewitz.

He is a 48-year old man. He has been married to his wife Lee since 1952. They have two children, 18 year- old Craig, and 16-year old Arlene, both of whom live at home, both of whom are in court today with their mother, Mrs. Nisnewitz.

Mr. Nisnewitz had a job as a licensed accountant with the City Hospital and Health Corporation until the indictments in this case came down and he was fired. He is now self-employed and earning a marginal income.

The indictments in this case indicate, and I

think the government's evidence indicated, that although Mr. Nisnewitz may have had a role in funneling bank applications, false bank applications, to a variety of banks in New York, that he was not the initiator of the scheme, he was not the one who profited by the scheme aside from accounting fees, and other professional services thathe was prepared to render, and that the indictment here has already caused him substantial stresses in his

His family has stayed with him strongly. I have met with all of them from time to time since your Honor appointed me to represent him. And they are a strong family unit.

family, loss of job and loss of income.

There is discord, as there is in every family, there is especially discord as a result of the charges brought against Mr. Nisnewitz.

As your Honor knows, he is the subject of -was the subject of three indictments, one more to go to
trial before Judge Gurfein in September, all based, equally involving the same scheme.

I think, your Honor, that in light of his family history and his medical history, that he is a fit subject, your Honor, for probation, under these offenses for which he stands convicted.

wc:mg

The American Bar Association standards dealing with probation indicate that probation is a desirable disposition where the individual is not likely to be a threat to the community, and that where probation would affirmatively promote the rehabilitation of the subject.

Mr. Nisnewitz shows what he did. He has made a statement to his Probation Officer of which your Honor has been advised. And it would seem to me, your Honor, that to send a man of this age and of this family background and of the nature of these offenses to jail for these offenses would be an unwarranted punishment, not only upon Mr. Nisnewitz, but also upon his family, who stand to lose far more than Mr. Nisnewitz stands to gain by being sent to jail.

I have only another brief statement to make, your Honor, and that is that the criteria for granting probation, according to the American Bar Association, should be based on the facts and circumstances of the offense and the facts and circumstances of the individual's background.

Confinement, in my opinion, your Honor, is
not necessary to protect the public from further criminal
activities by this defendant. He is not in need of
correctional treatment in the sense that he has a pattern

2 or life of crime.

This is, as your Honor knows, his first brush with the law.

It would really -- it would not depreciate
the seriousness of the offense involved here to the
world at large and to this defendant in particular that a
jail sentence is not warranted.

Finally, your Honor, I would indicate to your Honor a belief that although I have known Mr. Nisnewitz only for a short time, that this brush with the law directly relating to his professional activities as a licensed accountant, will have an effect, I believe, on the way he conducts his accounting profession in the future, if he is allowed to do so by the State of New York.

There are references throughout the probation report to experiences he has had with the licensing authorities. None of those has resulted in anything more than a warning. Some of them involve advertising.

Some of them involve legitimate grievances over fees paid. None of them involve anything that approaches the seriousness of these offenses.

And I believe that since these offenses have been committed, now nearly two and a half or three years

ago, Mr. Nishewitz is fully aware that his accounting-that when he holds himself out as a professional accountant to the community, he must adhere to the strictest
standards of morality and ethics and that this offense for
which he stands convicted will impress that upon his mind
all the more seriously if your Honor grants him probation
and allows him to continue his life in the community.

I believe Mr. Nisnewitz has a brief statement to make.

THE COURT: Which I would be pleased to hear.

Mr. Nisnewitz, you may make a statement if you like.

DEFENDANT NISNEWITZ: I would like to, sir, but not being a speaker, I would like your permission if I may read it.

THE COURT: Certainly.

DEFENDANT NISNEWITZ: Sir, I stand convicted
before you (weeping) -- I stand convicted before you by
a jury. I do not think this is the time for me to
get into a discussion of all the facts of these cases ex cept to say that I do not think I am guilty of all the
crimes which the government has charged me with.

Whether I am guilty or not, I am very distressed and sorry about getting involved in this whole affair; and

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I know I have caused my family a terrible amount of stress and grief.

I want to ask your Honor from the bottom of my heart to be merciful to me and not to send me to jail. That would be far more punishment to my family than I could bear.

I thank you very much.

MS. HYNES: Your Honor, because Mr. Brodsky was not trial counsel and these remarks may be unnecessary, but just to make the record clear, because your Honor did hear the evidence in the case, Mr. Brodsky mentioned that Mr. Nisnewitz did not profit from the scheme and did not initiate the scheme.

Well, he certainly, the evidence showed he was the moving force in the scheme and that there were fees paid-- there were fees paid to him for the loan applications and that they were not for accounting fees.

I have not seen the statement that Mr.Nisnewitz has made to the Probation Officer so I do not know whether there is--

THE COURT: Would you like to look at it?

MS. HYNES: Let me just finish. Then I would like t read it, your Honor.

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But my point is that Mr. Nisnewitz has just

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said that he still is not guilty and I don't know whether he feels - - one of the prime considerations is remorse.

And, of course, in this case, where you do have an accountant, he is a professional and is held to a high standard, and I think that your Honor is well-aware that the government takes the position that with respect to the so-called white collar crime that the deterrent effect is extremely important on the accounting community and that that should be a warning to the accounting community.

I will take the opportunity to read the statement of Mr. Nisnewitz.

He still has one open indictment. It is set for trial. That is certainly his right. But it is --

THE COURT: I am not going to give any consideration whatsoever to any charges other than the ones that are before me.

MS. HYNES: I agree. I agree totally, your Honor. I simply say that the government would stress here that this is certainly a case where the sentence is very important to the government in the terms of the deterrent effect, and that is really the point that I want to make.

And also clear the record as to what the evidence at the trial really did show as to Mr. Nisnewitz'

participation and Mr. Nisnewitz' economic benefit from the activities.

THE COURT: Mr. Brodsky wishes to speak to me and you read that while he is speaking.

MR. BRODSKY: Just one point, your Honor.

I believe Mr. Nisnewitz' reference in his brief statement to your Honor about not being guilty of all the charges of which he stands charged is reference to the indictments which are still pending before your Honor -- still pending in this court.

Because, as your Honor knows, in Mr. Nisnewitz' statement to the Probation Officer, he indicated that the information the applicants gave him concerning the purpose and the employment, income, etc. was incorrect and that he knew that at some point, and that he acknowledged the wrongdoing. And the only statement that appeared to mitigate his knowledge of wrongdoing, was, in making such a kind of statement, was not in violation of law, or the making of the statment on a, incorrect bank application is a violation of law.

But I don't think it is correct, your Honor, that Mr. Nisnewitz does not stand before your Honor as remorseful.

THE COURT: Ms. Hynes, I don't know that you

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really need to comment to me on that.

MS. HYNES: I do not, your Honor.

THE COURT: I am prepared to sentence.

The problem that I have, Mr. Brodsky, and I direct this to you initially, because you have urged probation here; the problem that I have -- and I suppose I should address this to your client, really -- Mr. Nisnewitz, the problem that I have with this case is that what happened here was, as the jury found, part of the plan to send people to you from Dare To Be Great in order that you would process loans for them, and be paid a fee for your services in those loans, and that the prospective borrowers were of such an unworthy quality, known to you and also known, according to the proof in this case, also known to your wife, who participated with you in the preparation of false W-2 forms that were submitted with some of these applications, that I regard it as a deliberate despoiling of the funds of these banks, almost in the nature of stealing; that you send a man to a bank for a \$5,000 loan and you know he is on welfare; you know that loan is not going to be repaid, and that the bank is going to be out its money. And six counts here involved doing just that. And it is next door to stealing, because you know that a person that is on welfare is not

going to pay, that a person who has no job is not going to pay.

And I am bound by what the jury found here, and I must say I do not differ in their finding.

When people came to you and said they had no employment, you said, "Well, say you work in so-and-so's body shop" or "say that you work at the Salvation Army," as I recall.

I am further distressed at the fact that upon the stand you testified that you did not know, and particularly one case where on the application form you put down that the man worked for the person that was right next door to you, even though you knew he came from 50, 60, 70 miles away, you put down your next-door neighbor as an employer, and as I recall, you conceded at some point during your testimony that you knew that wasn't true.

And that brings me to the statement that was made to the Probation Department. That statement reads: "I truthfully had no knowledge that the making of an incorrect bank application was a violation of law."

Now, I am troubled by the fact that even after the conviction here-- you have the privilege, of course, of saying nothing, but to fell the Probation Department

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and to tell the Court that you as an accountant for many years don't know that a bank is going to rely upon a statement of employment or a statement of income and that this not a violation of law. I do not credit that, sir. I don't credit it.

I therefore, much as I have agonized over this case, I cannot put you on probation. So that the sentence of the Court is that on counts 1 through 6, I am sentencing you to a year and a day, to run concurrently on each count.

As to Count 7, I am sentencing you to a year and a day, to be consecutively with those on the first six counts, but I am suspending those sentences, that sentence on Count 7.

I am placing you on five years' probation.

The purpose of that is that that sentence on Count 7

shall remain in existence during the period of the probation that I have provided.

That is the sentence of the Court.

MR. BRODSKY: Your Honor, I don't want to-- I want to, if I may, respectfully, your Honor, appeal again to to your Honor to reconsider the sentence on the grounds not of Mr. Nisnewitz' state of mind or whether he was an active or an inactive participant, because he stands

convicted, but on the effect that a sentence of a year and a day will have on his family and the effect that that will have on the community, both in the sense that the enormous expense that Mr. Nisnewitz-- the enormous expense of jailing Mr. Nisnewitz and keeping him in custody for whatever period of time, a year and a day, really amounts to good time allowances, and the enormous burden placed upon the community where they live, upon his wife and children, because in fact they have no other income aside from Mr. Nisnewitz' employment.

They are going to be forced to rely upon public assistance during this period of time, if Mrs. Nisnewitz cannot obtain any other employment. I am sure because of her own disability, it is extremely difficult indeed.

I will just make an appeal to your Honor based upon those considerations and the effect this will have on his family.

THE COURT: Mr. Brodsky, I have agonized over this sentence--

MR. BRODSKY: I know you have, your Honor.

THE COURT: -- for that very type of reason.

And one of the tragic difficulties of life is that when a person gets involved in what the jury found, in my opinion correctly, he was involved in here, this does

1 wc:mg 25 2 have a collateral effect upon family, and to that extent 3 it is a tragic effect. I do not overlook the testimony that was given 5 here of Mrs. Nisnewitz' participating with him a little 6 bit, which I think blunts a little bit of the appeal that 7 is being made. To the effect that this has an effect upon his 9 wife and children, I fear that that is something that 10 flows from his conduct that was revealed by this trial, and I regret to say I must adhere to my sentence. 11 12 MR. BRODSKY: Your Honor, may the defendant 13 be maintained on his own recognizance pending appeal? 14 THE COURT: I take it that there will be no ob-15 jection to that. 16 MS. HYNES: Your Honor, if the appeal is filed 17 forthwith. 18 MR. BRODSKY: Of course. 19 MS. HYNES: We will not have an objection to 20 it. 21 THE COURT: All right. I will allow it. 22 MR. BRODSKY: Thank you. 23 THE COURT: Now, Mr. Brodsky, there is some 24 form that was given me that I apparently must--25 MS. HYNES: Your Honor, if I might say, however,

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I think that with respect to the appeal, I must say in good conscience and while it is not for me to pass upon, I just cannot imagine an appellate issue in this case that would be one that the Court of Appeals would reverse a conviction on, and therefore I just think that what I should do is check with my superiors and perhaps I spoke too quickly.

If you could just give me an opportunity to check with my superiors as to what my authority is on that -

THE COURT: Well, --

MS. HYNES: I am just not sure that I have the authority, to agree to that.

THE COURT: As I say, whether or not you do, I am going to assume that.

MS. HYNES: Fine.

MR. BRODSKY: All right, your Honor.

THE COURT: I will assume that. I agree with you that I do not see an appellate issue here, but I am not going to foreclose that in this case.

MR. BRODSKY: Frankly, I have no idea, your Honor.

THE COURT: I am not going to foreclose it in this case.

MS. HYNES: So if the record can just be that it is your Honor's ruling that he can remain on his own recognizance pending appeal.

THE COURT: Let us put it this way: I find no reason to change his bail status pending appeal, and on the representation of counsel that an appeal will be speedily prosecuted.

MR. BRODSKY: It will, your Honor.

THE COURT: I will continue him on his own recognizance.

MR. BRODSKY: I have prepared whatever papers you had previously provided to Mr. Friedman to prosecute the appeal, the financial affidavit, and a form for the ordering of a transcript; and a notification.

THE COURT: This is an information form for the Second Circuit, information as to counsel on appeal and so on. Is that the one you are speaking of?

MR. BRODSKY: Yes, your Honor. It is a several-page statement.

THE COURT: Now, I take it that the answer to questions in the affidavit of financtial status being filed--

MR. BRODSKY: I have provided that, your Honor.

THE COURT: -- is yes. Is there any question

wc:mg 28 that the defendant's financial status is such that appoint-3 ment of counsel on appeal is warranted in this case? Ms. Hynes, do you have any views on that? MS. HYNES: I really don't have any information 6 that I could really enlighten the Court on Mr. Nisnewitz, financial status. THE COURT: There is no statement of income here at all. 10 MR. BRODSKY: He is self-employed, your Honor, and whatever income he has, he has by virtue of clients 11 12 who come to him from time to time. I think the form 13 has been completely filled out, but I don't have a copy 14 of it in front of me. 15 THE COURT: I have it here and it doesn't state 16 any income. 17 MR. BRODSKY: Mr. Nisnewitz informs me that he receives about \$11,000 a year in fees from his clients. 18 19 THE COURT: Does that qualify him under the Criminal Justice Act, to your knowledge? 20 21 MR. BRODSKY: I believe it does, your Honor, with 22 expenses and other debts. He would have a net, I believe, 23 in the financial statement that he has provided to the Probation Office. 25 THE COURT: On that representation, I will permit

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it, and if the government at some point wishes to --

MS. HYNES: I'm sorry, your Honor, that I can't be more helpful.

I just don't know the financial limits at this point. I will check it out and if it is different, I will inform you.

THE COURT: All right.

So I will certify the warrants, appointment of counsel. I will certify that you, Mr. Brodsky, shall be appointed as counsel on appeal, which I take it is his and your desire?

MR. BRODSKY: Yes, your Honor.

THE COURT: And have you filed-- you are going to file an appeal?

MR. BRODSKY: Yes, your Honor.

THE COURT: - I will grant the right to proceed on in forma pauperis and that the trial minutes will be transcribed at the government's expense.

(Time noted: 5:50 p.m.)

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been made, so that if they ask for a statement of Mr.

LaMorte to the FBI, that only that part that was admitted in evidence is available for them.

They may well ask for the indictment, and I take it that I have your authorization to send it to them. I don't know that I need your authorization, but if they ask for it, a clean copy should be available.

MS. HYNES: Your Honor, we have a clean copy and in the event that the jury should ask for individual copies, we have individual copies available.

I think the Court may have in its possession Exhibit No. 8, which is the grand jury testimony of Mr. Nisnewitz. The portion which the government did not read has been excised.

With respect to the defendant's exhibit, I do not think that they have excised portions not in evidence.

(At 12:50 p.m.)

THE COURT: Put on the record my statement about my going to lunch.

I gather counsel can and it is their desire
to stipulate that if during the lunch hour the jury
wishes either the indictment or any exhibits, that
Mr. Dorsa is empowered in my absence to furnish them to

Is that so stipulated?

MR. FRIEDMAN: So stipulated.

MR. DRESCHER: All counsel so agree.

MS. HYNES: So stipulated.

(Luncheon recess.)

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2:15 p.m.

(In the robing room, all counsel present.)

THE COURT: Upon returning from lunch, Mr.

Dorsa gave me two notes.

I will mark this one Court Exhibit A and this one Court Exhibit B.

AFTERNOON SESSION

(Court Exhibits A and B marked.)

THE COURT: Note No. 1 reads:

"1: A copy of the indictment for each juror.

"2: All documents entered in evidence."

These were furnished by Mr. Dorsa pursuant to stipulation.

There were then two questions:

"Question to the Judge. If you can answer, your Honor, what happens to a money order after it has been What is its point of destination?" cashed?

" 4: Is there any way we can verify whether or not there is a switchboard at Mr. LaMorte's bank?"

I propose to answer question 3 and 4 as follows, subject to your assistance to me.

"I cannot answer your questions. You must decide this case only on the evidence received on this trial and my instructions on the law applicable thereto."

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THE COURT: "Could we have Ramirez' application to the Kings Lafayette Bank, if the Court has it?"

The answer is it is not a part of this record. I will just say it is not a part of this record.

MR. DRESCHER: That's all. I don't know what else you can say.

THE COURT: All right, it is not a part of this record.

The answer to Court Exhibit C is "It is not a part of this record."

MR. DRESCHER: And not available.

(In open court, jury present.)

THE CLERK: All jurors present.

THE COURT: Ladies and gentlemen, I am in receipt of three notes from you which I have marked Exhibits A. B and C on behalf of the Court.

Exhibit A I ... erstand to be the first note and it had four parts; one asking for a copy of the indictment for each juror, and the second asking for all documents entered in evidence.

I understand those have been furnished to you.

Item 3 is a question to the Judge: "If you can answer, your Honor, what happens to a money order after it has been cashed? What is its point of destination?

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on this trial, and may be read to you, if desired."

Now, Exhibit C, which was just received:

"Could we have Ramirez' application to the Kings Lafayette Bank if the Court has it?"

The answer is no, it is not a part of this record.

I trust that I have appropriately, in accordance with the law, answered the questions that you have asked of me and you may continue your deliberations.

2:35 pm. (Jury retired to continue deliberations.)

(3:50 p.m. a note received from the jury.)

THE COURT: Now I have a note from the jury which I marked Exhibit D, which reads:

"To Judge Owen from Miss Ash.

"We request to hear all of Mr. Ramos' testimony including the cross-examination.

"In addition, we respectfully request that you clarify the different elements of the law we are to consider with respect to Count 7, the conspiracy charge...

"We believe there are three distinct elements the government is required to prove."

(Court Exhibit D marked.)

THE COURT: I will read to them the one page of my charge in which I have listed the three elements that

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the government is required to prove.

I will then have Mr. Birnbaum begin with the Ramos testimony, and read it to the end.

(In open court, jury present.)

THE COURT: Now, Miss Ash, I have received a note from you which I have marked Court Exhibit D, and turning first to your request for clarification in which you say you believe there are three distinct elements the government is required to prove:

Now, in response to that inquiry, I will reread to you that portion of my charge which I believe answeres your question.

"In order to convict a defendant on trial, the covernment must prove beyond a reasonable doubt the following essential elements:

- "1: The existence of the conspiracy charged in the indictment.
- "2: That the dfendant under consideration knowingly associated himself with the conspiracy.
- "3: That one of the conspirators knowingly committed at least one of the overt acts set forth in the indictment at or about the time and place alleged."

Those are the three requirements which I trust answered that request.